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Some Comments on the Civilianization of Military Justice

Chief Judge Robinson O. Everett, USCMA

This article is reprinted with permission from 9 AF JAG Rptr 81 (June 1980). It is based upon an address by Chief Judge Robinson O. Everett, United States Court of Military Appeals, at a luncheon sponsored by the Pentagon Chapter of the Federal Bar Association at Bolling AFB, Washington, D.C. on 13 May 1980. These remarks represent his first speech since joining the bench on 16 April.

Judge Everett received his A.B. (1947) and J.D. (1950) degrees, both magna cum laude, from Harvard, and holds an L.L.M. from Duke (1959) where he became a tenured professor of law in 1967. He served on the Harvard Law Review, authored the textbook Military Justice in the Armed Forces of the United States, which has been cited by the Supreme Court, served as Associate Editor of Law and Contemporary Problems, and in 1977 was largely responsible for the rejuvenation of the Reporter in its present form.

Judge Everett served as an Air Force judge advocate during the Korean Conflict. On release from active duty he became the Commissioner of the United States Court of Military Appeals and enjoyed a distinguished career in the Judge Advocate General's Department Re-

serve. He retired as a colonel in 1978, having enlisted as a private in 1950.

From 1961-1966, Robinson Everett served as counsel and consultant to the subcommittee on Constitutional Rights of the Senate Committee on the Judiciary. There, he participated actively in extensive studies and hearings leading to enactment of the Military Justice Act of 1968.

Judge Everett has also maintained a private law practice including extensive trial and appellate work. Active in the organized bar, he is past Chairman of the American Bar Association's Standing Committee on Military Law and past President of the Durham Bar. He has served as a Commissioner on Uniform State Laws under appointments from three governors.

Obviously my choice of topics is restricted, Since I cannot talk about pending cases and since, up to this point, I have no published opinions of my own to explain or defend. In such a dilemma one standby is to regale an audience with statistics. Therefore, I requested Frank Gindhart, our Clerk of Court, to provide me data about the Court that might be of interest to you. Here is some of the information that he furnished:

Questions and Answers about the United States Court of Military Appeals

1. What is the present caseload? (As of May 15, 1980.)

The present court has heard arguments in 21 cases in April and May and 12 cases are scheduled or targeted for argument in June.

There are an additional 170 granted cases which will not be argued but will be decided on the briefs following arguments in related cases.

There are 5 extraordinary writs pending.

There were 185 petitions filed last month. The average number of petitions filed per month this fiscal year is 141. Petitions have been granted this year at the rate of one in six (17%).

2. Where have our cases come from over the court's 29 year history?

ARMY	49%
NAVY	16%
AIR FORCE	15%
MARINE CORPS	18%
COAST GUARD	1%
OTHER	1%
TOTAL	100%

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Issues may be cited as *The Army Lawyer*, [date], at [page number].

3. How often have we reversed the lower court in granted and certified cases during this time?

Reverse	54%
Affirm	43%
Mixed outcome	3%

4. How does the court line up in a typical opinion during its history?

Unanimous opinions	39%
Majority opinion with a dissent	25%
No-majority opinions	8%
Other	28%

5. What has been the average length of time from filing to decision in a granted case?

7.5 months.

6. What has been the average length of time between argument and decision?

3 months.

7. How many attorneys have been admitted to practice in the Court during these 29 years?

22,431.

As of the time of these remarks, I have heard arguments in ten cases. While I cannot discuss the merits, I do have two comments about those arguments. First, as I have told many others, the quality of the appellate advocacy was excellent. In recent years, I have appeared from time to time before the Court of Appeals of North Carolina and the Court of Appeals for the Fourth Circuit. Inevitably I have listened to a number of arguments while waiting for my own cases to be called. In my opinion, the quality of the appellate advocacy I have heard in the Court of Military Appeals was at least equal to the quality of advocacy in those other courts. Hopefully, the Court's Annual Homer Ferguson Conference on Appellate Advocacy has helped develop those skills.

In the second place, the cases I have heard afford a rich menu of issues, such as the interpretation and effect of the NATO Status of Forces Agreement, the scope of access to witnesses before trial, the extent of the obligation to provide counsel during lineups, clarification of a commander's power to authorize or to participate in a barracks inspection, what events suffice to trigger the *Burton* rules on speedy trial, what events negate the Providency of guilty plea, and the role of general deterrence in argument or instructions on sentence.

Now let me turn to another topic. In connection with my nomination and confirmation, often I was asked, "How do you feel about the civilianization of military justice?" I sometimes responded that I was unsure what the questioner meant by the term "civilianize." Next, I usually pointed out that, if to "civilianize" meant ignoring the uniqueness of the military society and its needs, then I was opposed; but if the term referred to the acknowledgement that certain basic ethical norms apply to the military, as well as to the civilian, society, then I was in favor.

Today, let me talk in more detail about the civilianization question? Frequently, the propounder of the question is reflecting an assumption—and an accompanying fear—that this process would turn over the courtroom and Courthouse to military accused and their counsel. Ironically, this assumption is often completely at odds with the reality; and sometimes to replace a recognized rule of military law with a rule derived from civilian jurisprudence would lead to more conviction, rather than fewer—to fewer acquittals, rather than more. I am especially aware of this irony because I have had recent experience in defending criminal cases in civilian trial courts which, in some respects, seemed less paternalistic than military tribunals.

Let me give some examples. With respect to waiver of objections to the admissibility of evidence by failure to object vigorously, military law, in my view, has long been more protective of the accused than civil courts have been. You are familiar with some cases, I am sure, where our Court has granted relief to an accused despite his counsel's failure to object promptly to certain evidence. Similarly, it is my impression that military judges have been placed under a greater obligation to give instructions *sua sponte* than would be true in the federal district

courts. Sometimes they have even been held to have erred in omitting an instruction which defense counsel requested not be given.

Article 45 of the Uniform Code provides that if, after a plea of guilty, the accused sets up matter inconsistent with his plea, then a plea of not guilty will be entered. In a number of cases that over the years have reached our Court the issue was whether an accused's testimony or other evidence in mitigation and extenuation was inconsistent with his plea. In the civil courts, it seems well-established that a guilty plea will be deemed voluntary and not improvident even though the defendant testifies during his trial that he was innocent of the offense to which he pleads guilty. *Alford v. North Carolina*, 394 U.S. 956 (1969), where a defendant pleaded guilty to a lesser charge of second degree murder was denied post-conviction relief absent a showing that his principal motivation was to avoid the death penalty, makes this perfectly clear.

Indeed, in comparing the records on trial that I have seen with the guilty plea procedures I have observed in civil courts, it appears to me that military judges are especially diligent in assuring the voluntariness of a plea of guilty. Furthermore, in military law an accused has a real opportunity to obtain a sentence lower than that for which he has bargained with the convening authority. In a civil court the plea bargain usually amounts not only to a ceiling but also a floor on sentencing.

A final example will suffice to make my point that a civilian rule may produce more convictions than the corresponding military rule. In military law Article 31 has for some years been interpreted to prohibit compulsion in obtaining handwriting and voice exemplars, urine specimens, blood samples, and the like. On the other hand, the Supreme Court has in several cases—such as *Schmerber v. California*, 384 U.S. 757 (1966) (blood sample), *Wade v. United States*, 388 U.S. 218 (1967) (lineup identification) and *Gilbert v. California*, 388 U.S. 263 (1967) (handwriting exemplars, lineup identification) — refused to encompass such evidence within the Fifth Amendment's privilege against self-incrimination.

Up to this point I have not received instruction on the Military Rules of Evidence, which will take effect on September 1, 1980. Since they were modelled on the Federal Rules of Evidence, I presume that they represent a "civilianization" of the military law of evidence. I will be interested to see whether this change will lead to more acquittals or—as I suppect—to a high probability of conviction.

Those who ask about the civilianization of military law should also be reminded that, in many instances, civilian criminal law administration has moved towards a military model which provided greater safeguards. We are all familiar with Chief Justice Warren's opinion for the Supreme Court in *Miranda v. Arizona*, 384 U.S. 436, 489 (1966), where, among other things, he cited Article 31 to justify the imposition of a warning requirement in custodian interrogation. Similarly, the acknowledgement of the legitimacy of plea bargaining, which took place in *Santobello v. New York*, 404 U.S. 257 (1971), which required placing plea bargains on the record, was preceded by development in the Army, Navy, and Marine Corps of a practice for written plea agreements between the accused and the convening authority.

The discovery practice in federal and state criminal trials has inched towards that which for decades has existed in courts-martial, even though a substantial gap still remains. The non-unanimous verdict by a "jury" of less than twelve—which has been familiar in law—is now authorized by the Supreme Court for civilian criminal trials—at least, in the state courts.

Despite the exception of *Middendorf v. Henry*, 425 U.S. 25 (1976), which denied the applicability of the Constitutional right to counsel in courts-martial, courts-martial are typically more generous than civil courts in making counsel available; and in the military specific counsel can be requested, who will be furnished if reasonably available. Unlike civil courts, no showing of indigency is required to

have military counsel appointed for an accused in a general or special court-martial. Similarly, availability of a verbatim record of trial by court-martial does not depend on demonstrating indigency, as it usually does in civil courts.

Appellate review of the appropriateness of a sentence imposed has been accepted in military law but has been almost unknown in civilian jurisprudence, although there is increasing clamor to provide such review. Similarly, it is rare in civilian appellate practice to find a provision for appellate review of the facts, like that which a Court of Military Review is authorized to undertake.

I am under the impression that in some respects, the Court of Military Appeals has itself, provided a model that has been followed outside of military criminal justice administration. Ours was among the first appellate tribunals—if not the first—to use a central legal staff to support its judges. The Court's innovations in the field of automated management information systems now are being emulated by several federal circuits and by a number of state appellate courts. (Incidentally, within a few weeks we expect to have installed an even more advanced system that will combine data-processing and word-processing in a way that I understand will be precedent-making in the legal environment).

Before I close, let me mention an area of the Court's activity in which at least one well-informed commentator suggests that we "civilianize" our approach. I recently read the draft of a proposed article by Gene Fidell, who also has written an excellent guide to the *Rules of Practice of our Court.* He suggests that our Court and its staff should chiefly rely on appellate defense counsel to raise the issues for consideration by the Court and take less initiative in reviewing records of trial independently in order to determine if review should be granted on issues which have not been assigned by appellate defense counsel. Gene Fidell suggests that, in light of the professionalism of appellate defense counsel, this approach is appropriate—rather than the more paternalistic approach which at times has characterized our Court's combing of a record for issues.

From my own experience as an advocate in other appellate forums, I am aware that few appellate courts will consider issues not clearly raised by an appellant. Indeed, in some appellate tribunals the rules of practice tend to obstruct the efforts to raise issues on appeal.

Frankly, I am gratified that our Court's appellate procedure is much simpler than that which applies in several state and federal appellate courts with which I am familiar. But how far the Court should go in shouldering the burden of appellate counsel is another question.

Apparently, there have been changes over the years in the Court's view about whether an accused and his counsel must show the "good cause" for granting a petition for review under Article 67(b)(3) of the Uniform Code, or whether the Court and its staff will come to their aid in the first instance. Mr. Fidell's article, when it appears, should foster a more informed consideration of this issue.

Now let me close, by expressing my pleasure at addressing this distinguished audience and my hope to do so again soon and often. Thank you!

Educational Opportunities for Legal Clerks and Court Reporters

CW3 Joseph Nawahine, TJAGSA

Formal military training for legal clerks and court reporters begins with introductory courses at Fort Benjamin Harrison and the Naval Justice School. The next programmed school training for enlisted legal personnel is the Advanced NCOES Course taught at Fort Benjamin Harrison for E-6 level soldiers. Legal clerks and court reporters often inquire about what else is available in resident and nonresident education. There are several courses. This

summary is not exhaustive, but describes the principal programs available for continued education.

Resident Courses at the JAG School

The Judge Advocate General's School offers two courses designed for enlisted soldiers. The Military Lawyer's Assistant Course covers various areas in criminal law and legal assistance, with an emphasis on the basics of legal research and the fundamentals of drafting correspondence. The course builds upon prerequisite nonresident instruction, also offered by the JAG School in the Law for Legal Clerks Correspondence Course.

The Law Office Management Course is offered every other year and will next be offered in 1982. As the course title implies, the course is designed for supervisory personnel having office management responsibilities. Detailed descriptions of these courses are given below.

The School allocates quotas for these courses to the major command training offices. Individuals who wish to attend must request space through their local training channels. Quotas cannot be obtained directly from the JAG School.

Military Lawyer's Assistant Course.

Lenth: 4-½ days.

Purpose: The course provides essential training in the law for legal clerks and civilian employees who work as professional assistants to Army judge advocate attorneys. The course is specifically designed to meet the needs of the Army legal clerk, MOS 71D, for skill level three training in para-legal duties.

Prerequisites: The course is open only to enlisted service members and civilian employees who are serving as paraprofessionals in a military legal office, or whose immediate future assignment entails providing professional assistance to an attorney. Students must have served a minimum of one year in a legal clerk/legal paraprofessional position and must have satisfactorily completed the Law for Legal Clerks Correspondence Course.

Substantive Content: The course focuses on Army legal practice, with emphasis on client service aspects of legal assistance and criminal law. The course builds on the prerequisite foundation of field experience and correspondence course study. Coverage includes legal research and bibliography; administrative eliminations and board procedures; legal assistance areas of Soldiers' and Sailors' Civil Relief Act; family law, consumer protection, landlord-tenant and taxation; military criminal law areas of substantive military offenses, military rules of evidence, role of court personnel, jurisdiction, pretrial procedures; legal research; written communication; interviewing techniques, and professional responsibility.

Law Office Management Course.

Lenth: 4-½ days.

Purpose: To provide a working knowledge of the administrative operations of a staff judge advocate office and to provide basic concepts of effective law office management to military attorneys, warrant officers, and senior enlisted personnel.

Prerequisites: Active duty or reserve component JAGC officer, warrant officer or senior enlisted personnel in grade E-8/E-9 in any branch of the armed services.

Substantive Content: Management theory and practice including informal and formal leadership, leadership styles, motivation, and organizational effectiveness. Law office management techniques including management of military and civilian personnel, equipment, law library, office actions and procedures, and budget management and control.

Resident Courses at Other Institutions

The Administration NCO Advanced Course (commonly referred to as the Advanced NCOES Course) and the Sergeants Major Academy are the two advanced courses for enlisted legal personnel. Selection for attendance is by a Department of the Army board and soldiers cannot apply directly.

The Administration NCO Advanced Course is to prepare selected enlisted personnel to perform duties appropriate to grade E-7 and to provide training in supervisory skills. The course is not intended to teach basic material in either the administrative or the legal field. Rather, the course is designed to enhance supervisory and managerial skills needed to function effectively in the next higher grade. In the area of supervisory capability, it is imperative that legal clerks and court reporters be competitive with the entire 71 Career Management Field. MILPERCEN considers the well-rounded, whole person when selecting E-6 personnel for promotion to the next higher grade. Consequently, the course emphasizes training in leadership, administration and personnel.

Course descriptions for the NCO Advanced and Sergeants Major Courses follow.

Administration NCO Advanced Course.

Length: 6 weeks. Five weeks cover common subjects; one week covers 71D/71E subject areas.

Purpose: To prepare selected soldiers in grade E-6 to perform duties appropriate to pay grade E-7.

Prerequisites: Active Army or Reserve Component. Grade E-6. Qualified in MOS 71D or 71E. Maximum service: 17 years. Active duty service after completion of course (for active duty personnel only): 10 months. Additional prerequisites are announced annually by DA message.

Training Location: Fort Benjamin Harrison, Indiana.

For additional information on the course, refer to DA Pam 351-4.

U.S. Army Sergeants Major Academy.

Lenth: 22 weeks.

Scope: Leadership and human relations; resource management, military and world studies.

Prerequisites: Active Army or Reserve Component. Grade E-8 (with at least one but not more than five years in grade); must have 19 months' active duty remaining after completion of course. Secret clearance.

Training Location: Fort Bliss, Texas.

For additional information on the course, refer to DA Pam 351-4.

Correspondence Courses Administered by the JAG School

The Judge Advocate General's School administers a nonresident program aimed primarily at military lawyers. Most material has been prepared for the student who is an attorney. However, enlisted legal clerks and court reporters who have sufficient field experience may enroll in selected subcourses. Descriptions of subcourses appear in the School's Annual Bulletin (copies of which should be available in judge advocate offices) and DA Pam 351-20-17. Enlisted legal clerk or court reporter personnel interested in taking a course or selected subcourses should submit an application (DA Form 145) through the unit commander or staff judge advocate to:

The Judge Advocate General's School, U.S. Army
ATTN: Correspondence Course Office
Charlottesville, Virginia 22901

The School has two courses designed for enlisted personnel. One is the Legal Administrative Technician Course (completion of which is mandatory prior to submitting an application for appointment as warrant officer, MOS 713A) consisting mainly of management, writing, and legal subcourses. The other is the Law for Legal Clerks Course, designed for the lawyer's assistant. Course descriptions follow.

Legal Administrative Technician Correspondence Course.

Purpose: To prepare Army members to perform or to improve the proficiency of performing duties of a Legal Administrative Technician, MOS 713A.

Scope: Personnel and office management, written communication, selected topics in military criminal and administrative law.

Prerequisites: Active Army or Reserve Component in grade of E-6 or above and possess a primary MOS of 71D or 71E. Completion of the Law for Legal Clerks Correspondence Course.

Law for Legal Clerks Correspondence Course.

Purpose: To provide Army legal clerks with the substantive legal knowledge for performing duties as a lawyer's assistant; to provide a foundation for resident instruction in the Military Lawyer's Assistant Course.

Scope: Military benefits, legal assistance programs, selected topics in administrative law, staff judge advocate functions, the military criminal law system.

Prerequisites: Active Army or Reserve Component enlisted legal clerk personnel and civilian law office assistants of any grade. The application for enrollment should contain a short statement in the education history section (Item 7) as to the applicant's duty position and qualification to take the course.

Correspondence Courses Administered by Other Institutions

The Sergeants Major Course.

Length: 102 weeks nonresident, 2 weeks resident (at Fort Bliss, Texas).

Scope: Provides instruction for selected E-8's and E-9's who have not attended the resident course of instruction on leadership and human relations, resource management, military and world studies.

Prerequisites: Active Army, Army Reserve, and National Guard; E-7 (Promotable), E-8, E-9; no more than 23 years' service (waiverable); no service obligation required upon completion; no age limit; personnel selected for the resident course are ineligible for the nonresident course; selection is by Department of the Army.

Administered By: U.S. Army Sergeants Major Academy, Fort Bliss, Texas.

Adjutant General NCOES Advanced Course (Administration).

Credit Hours: 362.

Purpose and Scope: To provide selected enlisted personnel with a working knowledge of the duties required to perform as NCO's in the grades of E-8 and E-9.

Eligibility: NCO's of all components of the U.S. Army in grades E-6 and E-7.

Administered By: Army Institute for Professional Development, U.S. Army Training Support Center, Newport News, Virginia 23628.

The Problem of Custodial Questioning After Dunaway v. New York

CPT Timothy J. Grendell, JAGC,
Office of the Staff Judge Advocate, 2d Armored Division, Fort Hood, Texas

Decision: Custodial questioning on less than probable cause to arrest is violative of the fourth amendment and results in an illegally obtained confession.[1]

On 5 June 1979, the United States Supreme Court rendered this decision in *Dunaway v. New York.*[2] Although *Dunaway* has not received the publicity accorded such landmark constitutional decisions as *Terry v. Ohio,*[3] this Supreme Court decision will have a significant affect on military and civilian law enforcement interrogation. Law enforcement personnel are

[1] Dunaway v. New York, 442 U.S. 200 (1979).

[2] 422 U.S. 200 (1979).

[3] 392 U.S. 1 (1968).

now prohibited from bringing a suspect into the custodial surroundings of a police station to question him or her in the hope that something may turn up, unless they have probable cause to arrest or apprehend.

Recently, the North Carolina Supreme Court in *State v. Morgan*[4] rendered the first major decision to attempt to limit the application of *Dunaway*. The North Carolina Court distinguished *Dunaway* on its facts, holding that the custodial questioning of a suspect without probable cause did not violate the fourth amendment when the suspect agreed to submit to questioning and was free to leave the custodial setting at any time.[5] Although it is only a state supreme court decision, *Morgan* could provide a possible solution to the problem of custodial questioning without probable cause raised by *Dunaway*.

Since *Dunaway* concerns a constitutional right, it most likely will affect the military. Military appellate courts have not yet determined the precise impact of *Dunaway* on the military law enforcement system. Anticipating such a decision in the near future, military law enforcement and military justice personnel should understand the *Dunaway* decision and its potential impact on the military justice system.

Dunaway v. New York[6]

On 26 March 1971, a proprietor of a pizza parlor in Rochester, New York, was murdered during a robbery attempt. The police received a lead from an informant implicating Irving Dunaway in the crime. They pursued the lead, but they were unable to produce sufficient evidence to obtain an arrest warrant. Nevertheless, the police brought Dunaway to the police station for questioning. Although Dunaway was not under arrest, he was not free to leave the police station.[7] Dunaway waived his rights and eventually made several statements and drew sketches which were incriminating.

Dunaway was convicted after his motions to suppress the statements and sketches were denied.[8] The New York Court of Appeals affirmed the conviction,[9] but the United States Supreme Court vacated the judgment and remanded the action[10] to the state courts for further consideration in light of the Supreme Court's supervening decision in *Brown v. Illinois*.[11] On remand, the trial court granted the defense motion to suppress the statements and sketches.[12] The Appellate Division of the New York Supreme Court reversed, holding that the police can detain an individual for questioning for a reasonable time, upon reasonable suspicion, and under carefully controlled conditions which assure the individual his constitutional rights.[13] The New York Court of Appeals dismissed the accused's application for leave to appeal.[14]

The United States Supreme Court reversed the decision of the New York Court of Appeals on the grounds that the police violated the fourth and fourteenth amendments when they took Dunaway into custody, transported him to the police station, and detained him for questioning without probable cause.[15] The majority, adhering to the distinction between and voluntariness under the fifth amendment and the fourth amendment's prohibition against improper seizures enunciated by the Court in

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[4] 299 N.C. 191 (1980).

[5] *Id.* at 197.

[6] 442 U.S. 200 (1979).

[7] *Id.* at 203 ("although he was not told he was under arrest, he would have been physically restrained if he had attempted to leave.").

[8] People v. Dunaway, Monroe City, Ct. App. (May 21, 1972).

[9] People v. Dunaway, 42 App. Div.2d 689, 346 N.Y.S.2d 779 (1973), *aff'd* 35 N.Y.2d 741, 320 N.E.2d 646 (1974).

[10] Dunaway v. New York, 422 U.S. 1053 (1975).

[11] 422 U.S. 590 (1975).

[12] People v. Dunaway, Monroe Cty. Ct. App. 116 (March 11, 1977).

[13] People v. Dunaway, 61 App. Div.2d 299, 303-04, 402 N.Y.S.2d 490, 493 (1978).

[14] 38 N.Y.2d 812 (1978).

[15] 442 U.S. 200 (1979).

Brown v. Illinois,[16] held that the advising of *Miranda* rights, although sufficient to protect Dunaway's fifth Amendment rights, was insufficient to alleviate the taint of his illegal seizure in contravention of the fourth amendment.[17] The court concluded that such improperly obtained statements could be admitted only upon adequate proof that they were the result of some intervening event, occurring between the illegal detention and the confession, which primarily motivated the defendant to confess.[18]

State v. Morgan[19]

On 6 March 1978, sheriff's detectives received information that Tommy Morgan had attempted to sell a radio similar to one owned by a murder victim. The detectives went to Morgan's home and told him that they wanted to talk to him at the sheriff's office. Although the detectives did not have probable cause to arrest Morgan at the time, he agreed to accompany them to the office. At the sheriff's office, Morgan was advised of his *Miranda* rights, which he waived. The detectives informed Morgan that he was not under arrest and on at least on two occasions told him that he was free to leave at any time. Morgan decided to remain and eventually made incriminating statements.

The trial court denied Morgan's motion to suppress his statements and he was convicted of murder.[20] On appeal, the North Carolina Supreme Court focused its examination on Morgan's status while at the sheriff's office.[21] The court noted that the dispositive issue is not the label which is appended to the encounter between law enforcement officers and an individual, but whether the individual has been deprived of his freedom of action by way of a seizure.[22] The court reasoned that a person is not arrested if he is free to choose whether to enter or continue an encounter with law enforcement officers and elects to do so.[23] The court concluded that Morgan was not deprived of his freedom of action because he was free to leave the sheriff's office at any time.[24] Since Morgan was not "seized," any statements he made after receiving his *Miranda* rights were admissible in court.[25]

Morgan is legally sound and fundamentally logical. Certainly in *Dunaway*, the Supreme Court deemed the impairment of Dunaway's freedom of action the gravamen of the fourth amendment violation. In *Dunaway*, the defendant was involuntarily removed to a police station for questioning. The evidence indicated that Dunaway was not free to leave even if he had wanted to do so.[26] In *Morgan*, the defendant was not seized in the fourth amendment sense of that term in that his freedom of action was not impaired by the police officers to the extent that he could not break off the questioning and leave if he had so desired. Morgan voluntarily entered into and continued the encounter with the officers. Since the basis of the Supreme Court's holding in *Dunaway* is the fact that the improper seizure tainted the subsequent confession, the failure of a seizure in *Morgan* renders the decision of the North Carolina Supreme Court valid.

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[16] 422 U.S. 590 (1975). In *Brown*, the Court stated:

> The exclusionary rule . . . when utilized to effectuate the Fourth Amendment, serves interests and policies that are distinct from those it serves under the Fifth . . . If Miranda warnings, by themselves, were held to attenuate the taint of an unconstitutional arrest, regardless of how wanton and purposeful the Fourth Amendment violation, the effect of the exclusionary rule would be substantially diluted.

Id. at 601-02.

[17] 422 U.S. 200, 213 (1979).

[18] *Id.*

[19] 299 N.C. 191 (1980).

[20] *Id.* at 196.

[21] *Id.* at 202-203.

[22] *Id.*

[23] *Id.*

[24] *Id.* at 203.

[25] *Id.*

[26] *See* note 7, *supra*.

Dunaway and the Military

In determining the effect of the *Dunaway* decision on the military, there are two questions that must be answered: Does the decision apply? And if so, when?

There is an initial temptation to rely on the argument that the courts have recognized the application of different fourth amendment standards in the military.[27] However, the recent trend of the Court of Military Appeals to limit the application of different constitutional standards in the military to circumstances of documented military necessity,[28] renders it most unlikely that the separate standards argument will succeed.

The answer to the second question, on the surface, appears to be simple. The constitutional standard enunciated in *Dunaway* becomes operative in the military when the servicemember is "seized" by military law enforcement personnel. But, ascertaining what constitutes a seizure in the military is a more complex issue. The following scenarios illustrate this point:

Case Number One: Specialist White has beeen identified as a possible witness to a rape. No evidence has been obtained connecting him with the crime. A CID agent calls White's First Sergeant, to direct White to see the agent at the CID office. White is told that he is a witness and he is not advised of his rights under Article 31. However, during the course of the conversation, he makes several statements which implicate him as an accessory to the crime.

Case Number Two: Specialist Smith is under investigation for rape. Although the CID case agent does not have probable cause to apprehend Smith, he picks Smith up at his on-post quarters at 2000 hours and takes him to the CID office for questioning. After being properly advised of his rights, Smith confesses.

Case Number Three: Specialist Brown is under investigation for rape. A CID agent comes to Brown's billets and asks him to come to the CID office for questioning. At the office, the agent informs Brown that he may leave at any time. Brown voluntarily agrees to submit to questioning, and after being properly advised of his rights, Brown confesses.

Case Number Four: Specialist Jones is under investigation for rape. Although the CID agent does not have probable cause to apprehend, the agent calls Specialist Jones' Company Commander, who then orders Jones to report to the agent at the CID office during duty hours. After being properly advised of his rights, Jones confesses.

In case number one, Specialist White is a "witness"[29] and his status is not affected by *Dunaway*. His admission would be admissible at a subsequent court-martial since law enforcement agents are not required to advise a witness under Article 31.

In case number two, Specialist Smith finds himself in the same position as Irving Duna-

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[27] *See e.g.*, Middendorf v. Henry, 425 U.S. 25 (1976): Parker v. Levy, 417 U.S. 733 (1974).

[28] Chief Judge Fletcher, concurring in United States v. Ezell, 6 M.J. 307 (C.M.A. 1979), enunciated what appears to be the current trend of The Court of Military Appeals concerning the constitutional effect of military necessity. He stated:

> Military necessity cannot assume the proportions of a legitimate constitutional justification for intrusive government action unless the party asserting it as warranting a different rule than in the civilian community shows this military condition to exist and to necessitate such a reasonable response by the government.

Id. at 327.

[29] "Witness: one who being present personally sees or perceives a thing." Black's Law Dictionary 1778 (1968). Military courts have applied a two-pronged test to determine if an individual being questioned was a "suspect". First, did the interrogator consider the person to be a suspect? Second, should the interrogator have reasonably suspected the person of committing an offense? *See, e.g.*, United States v. Anglin, 18 C.M.A. 520, 40 C.M.R. 232 (1969); United States v. Doyle, 9 C.M.A. 302, 26 C.M.R. 82 (1958); and United States v. Rice, 3 M.J. 1094 (N.C.M.R. 1977).

way. Dunaway was read his *Miranda* rights because he was in custody. Smith was informed of his rights under Article 31,[30] because he was a suspect. In both cases, the defendant was not formally arrested or apprehended. There is nothing in the military justice system that justifies a contrary determination concerning the admissibility of the statements in Smith's case. Rule 305(d)(1) (A) of the new Military Rules of Evidence expressly recognizes that in custodial questioning, a suspect must be warned of his Article 31 and Miranda rights.[31] Rule 311(a) of the new Military Rules of Evidence specifically prohibits the introduction of evidence obtained from unlawful seizures.[32] Rule 311(c) provides that a seizure is "unlawful" if it was conducted "in violation of the Constitution of the United States as applied to members of the Armed Forces."[33] This indicates that the seizure of a servicemember in violation of the constitutional standard stated in *Dunaway* also would violate Rule 311, assuming *Dunaway* is applicable to the military. Rule 311(e)(2), which provides that derivative evidence of an improper seizure is inadmissible, would render inadmissible any subsequent statement obtained after an improper seizure.[34] Therefore, based on the new Military Rules of Evidence and *Dunaway*, Smith's confession would be inadmissible unless the trial counsel could establish at trial that an intervening event attenuated the taint of the improper seizure.

Dunaway provides little guidance concerning the proper methods to dimish the impact of an improper seizure. Some assistance can be gleaned from the cases concerning the admissibility of a confession obtained subsequent to an illegal confession.[35] The Courts have consistently held that the presumptive taint of an illegal confession is attenuated by re-advising the suspect of his rights, informing him that the first statement is inadmissible, and obtaining a valid waiver before questioning him again.[36]

This procedure could also be utilized in the custodial questioning situation, law enforcement personnel could remove the suspect from the custodial setting, readvise him of his rights, inform him of the inadmisability of any statement made while in custody, and obtain a valid waiver before an admissable statement can be acquired.

The facts in case number three are similar to those in *Morgan*. Like Morgan, Specialist Brown does not appear to have been seized in the fourth amendment sense of that term because his freedom of action was not limited by law enforcement personnel. Brown's voluntary admissions would be admissible under Rule 311 of the new Military Rules since he was not seized or otherwise held in violation of the Constittuion. The questioning of Specialist Brown does not appear to be a custodial interrogation under Rule 305, since he was not in custody and his freedom of action was not restricted in any significant way. Under both the new Military Rules of Evidence and the holding in *Morgan*, Brown merely acquiesced to be questioned in a custodial setting. Even under a strict interpretation of *Dunaway*, the argument can be made that Brown was not seized because his freedom of action was not impaired by the conduct of the CID agent.

Case number four raises the question that at present has no answer. That is, is a commander's order to go to the CID tantamount to a seizure under the fourth amendment? The answer

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[30] The warnings required to be given to a suspect in the military include the right against self-incrimination and the rights to counsel. United States v. Tempia, 16 C.M.A. 629, 37 C.M.R. 249 (1967). *See* also Mil. R. Evid. 305(c).

[31] Mil. R. Evid. 305(d)(A)(i).

[32] Mil R. Evid. 305(a).

[33] Mil. R. Evid. 311(c).

[34] Mil. R. Evid. 311(e)(2).

[35] *See, e.g.*, United States v. Seay 1 M.J. 201 (C.M.A. 1975); United States v. Terrell, 5 M.J. 726 (A.C.M.R. 1978).

[36] In United States v. Hundley, 21 C.M.A. 320, 325, 45 C.M.R. 94, 99 (1972), CMA reiterated the well-settled rule governing the admissions of such statements.

to this question depends, in part, upon the facts of the particular case. Certainly, a trial counsel should argue that the commander has a right to dictate the duty location for his soldiers. Therefore, a soldier is not seized in the fourth amendment sense of the word if his freedom of action was merely limited by the commander's exercise of his authority. The trial counsel also should argue that since the commander cannot order the accused to talk to the CID agents the accused servicemember voluntarily entered into any custodial questioning. A defense counsel should argue that the trial counsel's argument is predicated on form over substance. The defense counsel should base this argument on the fact that whether the CID agent brought the accussed to the CID office or the commander ordered him to go there, the result is the same—the accused is involuntarily exposed to custodial questioning. Finally, defense counsel should emphasize that *Dunaway* defines seizure as the impairment of an individual's freedom of action. Although acknowledging the commander's right to dictate a servicemember's duty station, the defense counsel should argue that this authority applies only when the location pertains to a "military duty". While maintaing military discipline and order is a viable command objective, it is questionable whether this purpose is so distinctly military in nature that it would elevate the police function of interrogating suspected servicemembers to the level of a bonafide military duty. Defense counsel should argue that such an order by a commander is an illegal attempt to circumvent the accused's freedom of action and, therefore, is improper and unconstitutional.

Conclusion

Dunaway represents the current law concerning custodial questioning. Based on this decision, military law enforcement personnel would be well advised to refrain from transporting suspects to the police station or CID office for questioning without probable cause. Whether the custodial interrogation problem can be resolved by having commanders direct military accused to go to the military police station or CID office remains a question to be decided by the military appellate courts. It again presents the conflict between a constitutional right and the special requirements of the military.

Although *Morgan* is not a Supreme Court decision, it presents a potential alternative to the problem of custodial interrogation raised by *Dunaway*. Under the *Morgan* approach, military law enforcement personnel will have to secure a servicemember's voluntary acquiesence to submit to custodial questioning. If commanders can direct a servicemember to go to a custodial settting for possible questioning, then it appears logical that a servicemember can voluntarily submit to such questioning.

FROM THE DESK OF THE SERGEANT MAJOR

by Sergeant Major John Nolan

Since my last article, I have visited several additional installations and units. In doing so, I've observed that a number of legal clerks do not fully understand the mission of the local staff judge advocate office. This was true even though various resident and nonresident training courses provide an overview of the structure and mission of a typical office. So the problem may lie in lack of communication at these installations. Some of the legal clerks I spoke with, particularly those at battalion and brigade level, believe they are not fully used, only to be called upon by their SJA Office when "something goes wrong."

Many of our staff judge advocates, both in CONUS and overseas, have excellent programs for welcoming new legal clerks assigned to subordinate units. Some use their Chief legal clerk as sponsor in introducing new arrivals to the

headquarters staff and explaining the office mission; others have different get-acquainted methods. I recommend some such effort by all chief legal clerks, so that we can overcome this problem and thereby enhance our team efforts.

I am also impressed with the programs at several installations where chief legal clerks have monthly or quarterly meetings with all legal clerks and court reporters. These meetings are used to explain changes in laws and regulations, discuss problems of mutual concern, conduct SQT training seminars, and provide a general update on enlisted matters of interest.

I found on the installations I visited that staff judge advocates are concerned about the problems and welfare of their enlisted personnel. Many senior legal clerks realize this and act in the capacity of senior enlisted advisor to their staff judge advocate and actively seek to resolve problem areas. I encourage all senior noncommissioned officers to seek a more active role in looking after the welfare of 71D and 71E personnel, including those in subordinate units. Chief legal clerks should keep their staff judge advocates informed on all matters pertaining to enlisted personnel, especially those such as training, promotions, and personal matters which might affect the successful accomplishment of their mission. At the same time, and as necessary to enable this, chief legal clerks should take a personal interest in all aspects of their subordinates' welfare. Many of the "problems" brought to my attention should have been effectively resolved "in house" or through the chain of command, after discussion with the NCO supervisor or chief legal clerk.

Legal Clerk Handbook

DA Pamphlet 27-16 (Legal Clerk Handbook), which was published in 1972, has been rescinded. Due to significant changes in laws, regulations, and administrative procedures, this publication was significantly out of tune with other current publications. The Judge Advocate General's School, its proponent, forwarded the publication in 1975 to the Instructional Support Division of the recently redesignated US Army Soldier Support Center at Fort Benjamin Harrison, Indiana, for their review of suggested changes and possible input. Due to priorities established by TRADOC for the development of the Skill Qualification Test and Soldiers Manuals for MOS 71D/E, the Soldier Support Center was unable to revise the publication. While our legal clerks at Fort Harrison are aware of the possible need for an updated version of the Legal Clerk Handbook, since in essence it has served as the prime reference tool for novice legal clerks, they believe that the Soldiers Manuals developed by them have effectively replaced the Handbook. By comparing the Soldiers Manuals (FM 12-71D1/2/3, FM 12-71D4, and FM 12-71E2/3/4,) against DA Pam 27-16, I have found these manuals to be superior in content, style, and ease of use. I recognize that some areas covered in DA Pam 27-16, such as boards, are not contained in these manuals. However, other references are available which may compensate for this. Since this issue continues to be a matter of concern, I encourage you to send me a brief note with any comments concerning revision and reissuance of this publication. If sufficient positive responses are received, I will initiate reconsideration of the subject with the proponent agencies.

Advanced Schooling

Congratulations are in order to the more than 40 E6's who graduated from the ANCOC Class on 1 July 1980, and to MSG George Thorne who has just completed the US Army Sergeants Major Academy nonresident course.

SQT

By now, all legal clerks should have received their personal copy of the Soldiers Manual, which was forwarded to the field for the May-October 1980 SQT test period. Each legal clerk should have been issued a manual at least six months prior to being tested.

DA Circular 350-80-1 (Skill Qualification Test (SQT) Announcement for Fiscal Year (FY) 1981) has been distributed to the field. Super-

visors, especially, should obtain a copy if one has not already been received.

NCO Guide

FM 22-600-20 (The Army Noncommissioned Officer Guide), dated Mar 1980, has been distributed to the field. This is an excellent field manual for our noncommissioned officers.

Use of Local MILPO

A number of our legal clerks and court reporters are not using their MILPO in requesting assignments and accomplishing other personnel matters prior to calling SFC Meehan at MILPERCEN. I encourage all of you to first contact your local MILPO for such personnel matters as questions concerning reassignment orders, promotions, and awards. Only if the local MILPO cannot resolve the problem should SFC Meehan be called.

We have discovered that a good percentage of the calls that SFC Meehan gets can and should be resolved locally. Keep in mind that when his time is taken up with such calls, SFC Meehan is unable to work on required personnel actions, reassignments, and other important issued which merit action at MILPERCEN. Also, since the 23 personnel specialists and assignment managers in his office all require use of the 4-number rotary telephone line, tying up those lines further delays the conduct of business not only by him, but also by others. This is also the reason many of you have difficulty getting through to him.

Therefore, let's use his position for the purposes for which established, which are to *recommend* solutions to problems which are beyond the scope of local MILPO and to *recommend* appropriate assignment actions. You should also realize that he is our *Liaison* NCO to MILPERCEN, and final authority for recommended actions rests with the officials of that agency.

Jurisdictional Issues at Trial and Beyond

Captain Gary F. Thorne, JAGC, USAR

Introduction

The question of burdens regarding jurisdictional issues raised in courts-martial is one of continuing concern, without a clear and definitive answer. A review of the history of jurisdictional issues is undertaken here to establish what burdens exist both at the trial and appellate levels.

In *Runkle v. United States,*[1] the Supreme Court recognized that courts-martial exist for a special purpose and are dissolved once completed. The Court ruled it must appear "affirmatively and unequivocally" that a court-martial has jurisdiction, and no presumptions as to jurisdiction will exist.[2] The Court set a requirement that the averment of jurisdiction must be positive and cannot be inferred. This requirement related back to their initial statement that the court-martial is for a limited purpose, is created by statute rather than by the Constitution, and can exist only when in strict compliance with the statutes.[3]

The *Runkle* decision and its requirements were cited by the Court of Military Appeals in *United States v. Marker.*[4] In that case, the court recognized the need to insure the congressionally mandated protection of civilians from military jurisdiction.[5] The court ruled it

[1] 122 U.S. 543 (1886).

[2] *Id.* at 555, 556.

[3] In *Runkle*, the President was to personally review courts-martial decisions before a sentence could become effective. The court found the record did not positively show the President had personally acted and, therefore, there was no jurisdiction for imposition of the sentence.

[4] 1 C.M.A. 393, 3 C.M.R. 127 (1952).

[5] *Id.* at 131.

was "incumbent on the claimant for military jurisdiction over such persons to establish that authority therefor has been conferred by federal statute."[6] *Runkle* and *Marker* are key cases for reference whenever jurisdictional burdens are at issue.

Waiver of Jurisdictional Issues

Jurisdictional issues involve both *in personam* and subject-matter questions. One recurring problem in the military is whether either issue can be waived at a courts-martial. In the federal system one can waive *in personam* jurisdiction issues by not raising them at trial, but subject-matter issues can be raised at any time.[7] However, this rule has never been followed in the military in light of the decision in *United States v. Garcia.*[8] In that case, the court harkened back to the congressional mandate that a court-martial affirmatively establish jurisdiction over both the subject matter *and* the person before it. The court said that, because of this requirement, it could not follow the federal courts and permit waiver of *in personam* jurisdiction questions.[9]

Importantly, in *Garcia* the court did rule that it would find *in personam* jurisdiction where there was recorded evidence of "consent." A stipulation existed in *Garcia* which established "consent" on the part of the defendant, since the stipulation established he was a person subject to military jurisdiction. "Consent" seems an inappropriate term in the sense used in *Garcia*. The stipulation actually provided affirmative evidence of *in personam* jurisdiction. It is inconsistent with the case law to say a defendant could "consent" to court-martial jurisdiction if he was not in a proper status for court-martial jurisdiction to actually attach.

The *Garcia* rationale was followed in *United States v. Dickenson,*[10] where the court again affirmed that *in personam* jurisdiction, although not raised at trial, could be raised at any time, including before the Court of Military Appeals. The defendant in that case did not deny that he was subject to jurisdiction, but said he had "grave doubts." The court looked at the total record in the case and said they did not share that doubt, ruling that jurisdiction had been affirmatively established.

Two conclusions are to be drawn from the *Garcia* and *Dickinson* cases. First, it is clear that jurisdictional issues, whether *in personam* or subject-matter, may be raised at any time, since in *Dickinson* it was raised for the first time before the Court of Military Appeals. Second, the court in both of those cases undertook to examine the record on its own in resolving the issue of whether the prosecution had affirmatively established a basis for jurisdiction. Such an effort by the court should be recognized, since it forms the foundation for a valid argument that where jurisdictional issues are raised for the first time on appeal, the case need not necessarily be returned to the trial level for further hearing. This issue will be discussed further below.

Raising and Responding to Jurisdictional Issues

With the change of personnel at the Court of Military Appeals in the mid-seventies, there came a number of important decisions regarding jurisdictional questions. In *United States v. Barrett,*[11] a defendant's testimony regarding improper recruitment raised the jurisdictional issue at trial. The court ruled that the government then had "an affirmative obligation to establish jurisdiction."[12] This decision is important in its application to the question of when the jurisdictional issue is raised. The issue is of record when any evidence appears, even if it is

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[6] *Id. See also* United States v. Graham, 22 C.M.A. 75, 46 C.M.R. 75 (1972).

[7] 1 Wharton's Cr. Procedure § 13 (12th ed. 1978); Ford v. United States, 273 U.S. 593 (1927).

[8] 5 C.M.A. 88, 17 C.M.R. 88 (1954).

[9] *Id.* at 95.

[10] 6 C.M.A. 438, 20 C.M.R. 154 (1955).

[11] 1 M.J. 75 (C.M.A. 1975).

[12] *Id.*

only a statement by the defendant, negating either *in personam* or subject-matter jurisdiction. The government must go forward at that point to affirmatively establish jurisdictional requirements, just as would be required if a search was alleged to be improper or a confession involuntary.

The court went even further in *United States v. Alef*,[13] when they mandated an affirmative obligation on the part of the government to establish jurisdiction through charges. The applicability of *Alef*, however, is subject to debate.

Alef involved a question of drug offense jurisdiction. It seems clear that the intent of the court, realizing the continuing problems with drug jurisdictional questions, was to require the government to include in its charges the facts establishing a *prima facia* basis for jurisdiction over the accused and the offense.[14] The limited application of *Alef* regarding jurisdictional questions is recognized in *United States v. Saunders*.[15]

The *Saunders* court ruled that in *Alef* the specifications on their face indicated there was no jurisdiction since the offense occurred off-post. In *Saunders*, the defendant questioned whether the convening authority had personally appointed the military judge to the court. The court did not apply the *Alef* rationale to these facts. The court in *Saunders* ruled that the government had affirmatively established jursidiction when it announced that the court had properly been convened, and when the defendant raised no objection.[16]

The *Saunders* decision is consistent with past history as to the treatment of jurisdictional questions. Its importance is in the court's recognition that the affirmative obligation of the government regarding jurisdictional matters can be met with minimal effort. A simple announcement, common to all courts-martial proceedings, was enough to establish jurisdiction at the onset of trial. No further requirement of the government existed at that point, unless the defendant raised an objection stating some grounds as to why the statement of jurisdiction was not correct. The burden of going forward would then shift back to the government, which would have to refute that claim affirmatively.

As previously mentioned, the raising of jurisdictional issues at the trial level is analogous to search and seizure and confession issues. A simple statement as to jurisdiction is all the government need do at the onset. The burden of going forward with some evidence to refute that claim of jurisdiction then lies with the defendant. That burden can also be borne with minimal effort, since a simple statement by the defendant alleging some impropriety affecting jurisdiction would then shift the burden back to the government to affirmatively re-establish the jurisdictional requirements.

Once the issue is raised at trial, does the matter go to the jury, or is it a question for the judge? Early on, in *United States v. Ornelas*,[17] the military justice system recognized the question had to be divided. In *Ornelas*, a motion to dismiss on jurisdictional grounds was based on the defendant's claim that he had never been in the service. The charge in that case was desertion. The law officer refused to submit the jursidictional issue to the court, ruling himself that jurisdiction existed.

The Court of Military Appeals overruled that decision, referring to paragraph 67 of the Manual for Courts-Martial, which provides that jurisdictional issues can be decided by a judge as a final matter if the issue is interlocutory in nature. However, where the jurisdictional issue also goes to the merits of the case, the issue must go to the jury. Since *Ornelas* was charged with desertion and claimed he had never been sworn into the service, there was a

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[13] 3 M.J. 414 (C.M.A. 1977).

[14] *Id.* at 418.

[15] 6 M.J. 731 (A.C.M.R. 1978).

[16] *Id.* at 735.

[17] 2 C.M.A. 96, 6 C.M.R. 96 (1952).

factual issue for the court to consider, and it had to be instructed on the same.[18]

The issue was recently considered again in *United States v. Bailey,*[19] where the defense of no personal jurisdiction was raised. The court recognized that jurisdictional issues are normally interlocutory in nature and to be decided by the military judge. However, where the issue affects guilt, then it must go to the members. The court noted that paragraph 57(b) of the Manual does not change that standard, but insures that the military judge will not make a final determination on jurisdiction if the jurisdictional issue goes to the merits of the case.[20] In deciding that case, the court overruled the previous decisions of the Navy Court of Military Review in *United States v. Spicer*[21] and *United States v. Barefield.*[22]

The *Bailey* decision was followed by the Air Force in *United States v. Buckingham.*[23] There recruiter misconduct was alleged at the trial level. The court ruled that, where the question of jurisdiction goes to the merits of the case, as is true in most military type offenses, the issue must be presented to the jury. The court in *Buckingham* recognized that Manual paragraphs 57(b), and 67(a) and (e), are tempered by the decision in *United States v. Graham,*[24] where the Court reaffirmed the affirmative obligation on the Government to establish jurisdiction in an improper enlistment case.

Evidentiary Standards

Once the burden of going foreward is determined, the issue becomes what burdens must be met concerning the quantum of evidence. This was recently spoken to by the Air Force Court of Military Review in *United States v. Jessie.*[25] The charges in *Jessie* were burglary and larceny, and the *in personam* jurisdictional issue was raised at trial. The court ruled that, once the jurisdictional issue is raised, the affirmative obligation to establish jurisdiction over the accused rested with the Government. The standard of proof by a preponderance of the evidence is to be applied by the military judge, the convening authority, and the appellate courts in deciding whether the government has met its affirmative obligations to evince jurisdiction.[26] If the jurisdictional question also goes to the merits of the case, the issue is judged by the standard of proof beyond a reasonable doubt standard. This latter determination is to be made by the court members.[27]

The court based its decision in *Jessie* on the decision of the Court of Military Appeals in *United States v. Ornelas.*[28] The Air Force court distinguished *Alef,* indicating that that case condemned the procedural problems involved in litigating jurisdictional issues when the specification itself fails to establish any grounds for jurisdiction. In so deciding, the Air Force court clearly indicated its opinion that *Alef* applies to drug cases only.

The burden decision in *Jessie* is consistent with the rule that interlocutory issues are decided by the preponderance standard and that, on appeal, such decisions are reviewed for abuse of discretion.[29]

There is a troubling aspect to these cases. Does the preponderance standard enunciated in the cited cases square with the requirement in

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[18] *Id.* at 100, 101.

[19] 6 M.J. 695 (N.C.M.R. 1979).

[20] *Id.* at 168.

[21] 3 M.J. 689 (N.C.M.R. 1977).

[22] 1 M.J. 162 (N.C.M.R. 1976).

[23] 9 M.J. 514 (A.F.C.M.R. 1980).

[24] *See* note 6, *supra.*

[25] 5 M.J. 573 (A.C.M.R. 1978), *pet. den.*, 5 M.J. 300 (C.M.A. 1978).

[26] *Id.* at 574.

[27] *Id.*

[28] 2 C.M.A. 96, 6 C.M.R. 96 (1952).

[29] United States v. Otero, 5 M.J. 781 (A.C.M.R. 1978), *pet. den.*, 6 M.J. 121 (C.M.A. 1978); United States v. Eggleston, 6 M.J. 600 (A.C.M.R. 1978), *pet. den.*, 6 M.J. 294 (1978); United States v. Baily, 6 M.J. 965 (N.C.M.R. 1979); United States v. Buckingham, 9 M.J. 514 (A.F.C.M.R. 1980).

United States v. Graham,[30] that jurisdiction be "clearly shown" to insure that civilians are never subjected to trial by court-martial? There would seem to be a valid argument that the *Runkle* and *Marker* guideposts, as applied in *Graham,* may require something more than a preponderance of the evidence. That standard would obviously be clear and convincing evidence, but that is not the standard presently applied.

Presumptions of Regularity

The government's burden to establish jurisdiction is often borne through reliance on the presumption of regularity of conduct. In *United States v. Saunders,*[31] the Court of Military Appeals recognized the existence of a legal presumption of regularity of conduct. In the absence of a showing to the contrary, it is presumed that the Army and its officials carry out their duties correctly under regulations.[32] The question in *Saunders* was whether the convening authority had personally appointed the military judge to the court. This question was found to have been affirmatively answered by the government when the trial counsel announced that the court and the military judge were properly convened, and when no objection was raised by the defense. The *Saunders* court interpreted this routine procedure which takes place at the beginning of every trial to be an affirmative step on the part of the government which established jurisdiction and which required the defendant to come forward to rebut.[33] The court distinguished the *Alef* decision by correctly recognizing that there the specifications on their face indicated absence of jurisdiction. No such lack of jurisdiction was apparent on the face of the specifications in the *Saunders* trial.

It might be argued that the decision in *United States v. Singleton*[34] conflicts with the *Saunders* rationale. In *Singleton* the judge and court members had been orally appointed, and a later writing did not refer to any previous oral order authorizing the court to sit. At trial, there was simply an announcement that they were properly appointed, but the Court of Military Appeals ruled that announcement was insufficient to establish jurisdiction.[35] The difference between the *Saunders* and *Singleton* cases is that in *Singleton* the court was again faced with a record which showed there was no jurisdiction. This was so because the post-trial writing which purported to establish the court did not refer to the pretrial oral orders. Such reference was necessary to establish jurisdiction. In *Saunders,* no such facial lack of jurisdiction existed.

The basis for the presumption of regularity in the conduct of government affairs goes back to the early decision of *United States v. Masusock.*[36] The Court of Military Appeals ruled there that, in the absence of a contrary showing, the court would presume that the Army and its officials carry out administrative affairs in accordance with regulations.[37] There appears to be no reason why this presumption cannot continue to apply as to jurisdictional matters, providing that one is not faced with a situation such as in *Alef* or *Singleton,* where there is a *prima facia* problem as to jurisdiction.[38]

ETS Problems

One of the more common *in personam* jurisdictional issues arises where the enlistment of the accused expires at or near the time of the offense and/or trial. In *United States v.*

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[30] 22 C.M.A. 75, 46 C.M.R. 75 (1972).

[31] 6 M.J. 731 (A.C.M.R. 1978).

[32] *Id.* at 734.

[33] *Id.* at 735. *See also* United States v. Shearer, 6 M.J. 737 (A.C.M.R. 1978).

[34] 21 C.M.A. 432, 45 C.M.R. 206 (1972).

[35] 45 C.M.R. at 208.

[36] 1 C.M.A. 32, 1 C.M.R. 32 (1951).

[37] 1 C.M.R. at 35.

[38] *See* United States v. Moschella, 20 C.M.A. 543, 43 C.M.R. 383 (1971).

Smith,[39] a motion was made at trial regarding *in personam* jurisdiction, and was denied. The issue concerned whether the defendant was still in military service because of the expiration of his enlistment. The Court of Military Appeals ruled that expiration alone does not alter one's status for purposes of court-martial jurisdiction. A discharge is necessary and, if jurisdiction is established prior to a discharge, the defendant remains subject to court-martial jurisdiction until the trial is completed. In order to establish jurisdiction prior to a discharge, there must be official action to show that the legal process against the defendant has begun.[40]

The court ruled in *Smith* that writing down proposed charges is not enough, but that it would be enough to apprehend, arrest, or confine the accused, or to file charges against him or her.[41] The requirement for official action is to comply with paragraph 11(d) of the Manual which requires a commencement of action with a view towards trial.

In *United States v. Wheeley*,[42] the court applied the *Smith* rationale in determining the apprehension and restriction prior to the defendant's E.T.S. date was sufficient to preserve court-martial jurisdiction. This was so even though no administrative entry had been made in the record regarding flagging action.

It should be recognized that whether continued unprotested training with pay and allowances constitutes a waiver of regulatory requirements as to extension and jurisdiction of a court-martial was left open in *United States v. Hudson*.[43] One argument that such action does subject the individual to court-martial jurisdiction is based on the *Garcia* rationale that an individual can subject himself to *in personam* jurisdiction by "consent." If a service person continues to perform duties and receive pay and allowances beyond an E.T.S. date, there certainly is an argument that such action constitutes "consent" to be subject to military jurisdiction. However, the discussion in Part II of this article, above, as to the meaning of "consent," is troublesome when one tries to apply this theory.

In *United States v. Bowman*,[44] the correct manner of posing this argument was set forth. The court recognized that an individual cannot waive the jurisdictional issue, but also recognized, consistent with *Garcia*, that one may voluntarily "consent" to be retained in a status that subjects him to court-martial jurisdiction.[45]

The *Bowman* court finely defines "consent" by ruling that the defendant consented to be retained in a status that subjected him to court-martial jurisdiction. The court did not directly say that the defendant consented to court-martial jurisdiction. In doing so, the court was really finding affirmative record evidence to support its jurisdictional conclusion.

Consistent with this rationale was the decision in *United States v. Hutchins*,[46] where the court recognized that jurisdiction did not end with an individual's E.T.S. The court noted that a service person can demand discharge, but that if such a demand comes after the preferral of charges, it is too late for him to avoid prosecution.

Jurisdictional Issues Raised on Appeal

Another problem encountered is how to handle claims of jurisdictional violations when raised for the first time on appeal. In *United States v. Torres*,[47] the issue was raised for the first time on appeal. The Court of Military Appeals indicated that there was a serious issue of jurisdiction, because the factual basis thereof

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[39] 4 M.J. 265 (C.M.A. 1978).

[40] 4 M.J. at 267.

[41] *Id.*

[42] 6 M.J. 220 (C.M.A. 1979).

[43] 5 M.J. 413, 418 n. 9 (C.M.A. 1978).

[44] 9 M.J. 676 (A.C.M.R. 1980).

[45] 9 M.J. at 679 n. 12.

[46] 4 M.J. 190 (C.M.A. 1978).

[47] 48 C.M.R. 100 (1973).

was in dispute and could not be resolved from the record. An Article 39(a) type hearing was ordered on the jurisdictional issue, and the petition before the Court of Military Appeals was remanded on that basis.

In *United States v. Burke,*[48] a jurisdictional issue was raised for the first time on appeal before the Army Court of Military Review. The court ordered a hearing, saying that in such situations a rehearing was mandated by the *Torres* decision. The extension of this rehearing procedure was highlighted in *United States v. Adams,*[49] where again the jurisdictional issue was raised on appeal for the first time, the defendant saying he had enlisted at age 16. The record dates showed that he was 16 and an affidavit submitted on appeal showed the same. The Army Court of Military Review ruled that, absent an agreement by both sides, it was bound to return the case for a rehearing due to the *Burke* and *Torres* decisions.[50]

The *Adams* and *Burke* decisions should not be read to require a rehearing automatically merely because the jurisdictional issue is raised initially on appeal. In *Torres* the court recognized a factual dispute regarding jurisdiction and a record inadequate to resolve the matter on appeal. There is nothing to prevent an appellate court, where there are sufficient record facts, from resolving a jurisdictional issue on its own. That in fact was done in *United States v. Sylva,*[51] where the jurisdictional issue was raised for the first time in a writ of error coram nobis. Affidavits had been submitted and were in conflict. Nevertheless, the Army Court of Military Review examined the affidavits and said it had authority to make a factual determination. It did so by disbelieving the defendant's allegations.[52]

There is no particular magic in the fact that case involved a writ of error coram nobis. The same rationale can be applied by the courts of military review where the jurisdictional issue is raised for the first time and there are sufficient factual determinations in the record to support a ruling on the issue by the court.

The courts of military review in making such a ruling should apply the preponderance standard under the *Ornelas* and *Jessie* cases previously discussed. In so doing, they would exercise their fact finding authority, as was done in *Sylva* and in *United States v. Bivens.*[53]

However, if the jurisdictional issue raised for the first time on appeal also goes to the merits, must the courts of military review return the case to the trial level? Such would seem mandated, since jurisdictional issues cannot be waived and must go to the court members for consideration if such issues pertain to the merits. This conclusion results from application of the *Bailey* and *Buckingham* decisions.

If the jurisdictional issue is raised for the first time before the Court of Military Appeals, that court being without fact finding authority, the case should be remanded to the service court of military review if the record has sufficient evidence from which the lower appellate court could rule on the matter. If the record is inadequate, then, as in *Torres,* the case can be remanded to the trial level for a limited hearing on jurisdiction. If the jurisdictional issue raised before the Court of Military Appeals goes to the merits, the case should be returned to the trial level.

Conclusion

The overriding factor to be remembered whenever jurisdictional issues are raised is the consistent historical concern shown by military appellate courts that *in personam* jurisdiction be affirmatively established. This concern goes a long way to answer many of the other jurisdictional questions discussed herein.

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[48] 48 C.M.R. 246 (A.C.M.R. 1974).

[49] 49 C.M.R. 678 (A.C.M.R. 1974).

[50] 49 C.M.R. at 680.

[51] 5 M.J. 573 (A.C.M.R. 1978).

[52] 5 M.J. at 755.

[53] 7 M.J. 531 (A.C.M.R. 1979).

Witness Production and the Right to Compulsory Process

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Introduction

Probably no area of military justice procedure takes up more time, involves more expense, or creates more frustration than the production of defense requested witnesses. Unfortunately, inconsistent signals received from the Court of Military Appeals in recent years have served only to create confusion in this already unsettled area of the law. This article addresses the issue of compulsory process by reviewing the constitutional and statutory underpinnings of the right along with the relevant judicial decisions which seek to interpret that right.

Source of the Right

The Sixth Amendment to the United States Constitution provides that in all criminal prosecutions the accused shall enjoy the right to have compulsory process for obtaining witnesses in his favor. For well over a century the constitutional significance of this provision remained dormant[1] and not until *Washington v. Texas*,[2] decided in 1967, did the Supreme Court declare compulsory process to be a fundamental element of due process. In that same year the Court of Military Appeals in *United States v. Manos*,[3] declared this constitutional provision applicable to court-martial proceedings.

The ultimate objective of the compulsory process clause is to insure that the accused receives a fair trial by allowing him to present favorable testimony in court.[4] In the civilian sector this means the right to have the prosecutor issue and enforce a subpoena on behalf of the accused, and only upon a showing of indigency is the Government required to bear the expense of securing the witness' presence.[5] Article 46 of the Uniform Code of Military Justice provides the military accused with an expanded right to compulsory process by mandating that the defense have an "equal opportunity" with the Government to obtain witnesses, a phrase interpreted by the Court of Military Appeals as eliminating the requirement to show indigency when requesting Government paid witness production.[6]

Procedure for Securing Witnesses

Article 46[7] allows the President to establish regulations prescribing the procedures to be

[1] It is interesting to note that the compulsory process clause was one of the first sections of the Bill of Rights to be interpreted by the fledgling federal courts when Chief Justice John Marshall, sitting as a circuit court judge, considered the issue during the treason and misdemeanor trials of Aaron Burr. United States v. Burr, 25 F. Cas. 1 (C.C.D. Va. 1806) (14,692). In the course of broadly interpreting the clause, Chief Justice Marshall admonished that "the right given by this article must be deemed sacred by the courts, and . . . should be construed as something more than a dead letter." Not until 1967, however, did compulsory process emerge as a significant constitutional protection accorded to criminal defendents. *See generally* Cooper, *The Sixth Amendment and Military Criminal Law: Constitutional Protections and Beyond*, 84 Mil. L. Rev. 41 (1979).

[2] 388 U.S. 14 (1967).

[3] 17 C.M.A. 10, 37 C.M.R. 274 (1967).

[4] Since Washington v. Texas, *supra*, the Supreme Court has broadened the scope of compulsory process to include everything from accused's right to discover witnesses in his favor to the right to compel them to testify over claims of privilege. United States v. Augenblick, 393 U.S. 348 (1969); Webb v. Texas, 409 U.S. 95 (1972); Cool v. United States, 409 U.S. 100 (1972); Chambers v. Mississippi, 410 U.S. 283 (1973); Wardius v. Oregon, 412 U.S. 470 (1973); United States v. Nixon, 418 U.S. 683 (1974).

[5] Rule 17(b), Fed. R. Crim. Proc.

[6] United States v. Sweeney, 14 C.M.A. 599, 34 C.M.R. 379 (1964); United States v. Williams, 3 M.J. 239 (C.M.A. 1977) wherein the Court characterized Art. 46 as Rule 17(b)'s "military counterpart."

[7] Art. 46, UCMJ, provides that courts-martial shall have process similar to that available to federal district courts. Para. 115*d*, MCM, sets out the procedures for the issue, service, and return of subpoenas, while Para. 118 establishes contempt penalties for those who refuse to answer a subpoena.

used for securing defense witnesses. The President has exercised that authority in Paragraph 115*a* of the Manual for Courts-Martial. That paragraph requires the defense to submit all witness requests in writing to the trial counsel and further mandates that requests contain a synopsis of the prospective witness' expected testimony, reasons which necessitate the personal appearance of the witness, and any other matter showing that the expected testimony is necessary to secure the ends of justice. Prior to trial the determination on whether to produce the witness rests with the convening authority. In making this decision the convening authority is charged with weighing the materiality of the prospective testimony and its relevance to the guilt or innocence of the accused against the equities of the situation.[8] If the convening authority denies the request, it can be raised again at trial where the military judge will make the final determination. Although Paragraph 115*a* states that the military judge will apply the same standard as the convening authority in making his de novo determination, case law has altered this standard by requiring that he simply consider the materiality of the witnesses' testimony without regard to other matters.[9]

An ongoing controversy exists as to whether the requirements of Paragraph 115*a* are consistent with the "equal opportunity" provision of Article 46.[10] The argument goes that Paragraph 115*a* improperly discriminates against an accused because it imposes burdens in the procurement of defense witnesses that are not imposed upon the Government. In *United States v. Arias*[11] the Court of Military Appeals refused to consider this issue in the abstract and implied that accused would have to show some prejudice before the Court would grant relief. The Court did infer, however, that prejudice might exist if compliance with Paragraph 115*a* either interfered with accused's right to request witnesses or if it improperly required advance disclosure of the defense case.[12]

There seems to be little doubt that the accused's right to secure witnesses cannot be legally inhibited by the trial counsel, and that prosecution denial of defense access to the convening authority for submission of a witness request would certainly call for remedial action.[13] The question of how thorough the synopsis of a requested witness' testimony must be, however, is a matter yet to be resolved. Arguably, an *ex parte* defense request to the military judge, similar to those employed in federal practice,[14] could be insisted upon if the requirements of Para. 115*a* were to prejudice accused's case by forcing a premature revelation of the defense theory.[15]

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[8] Para. 115*a*'s singular reference to accused's "guilt or innocence" has never been interpreted to limit the compulsory process right to witnesses on the merits only. *See* United States v. Manos, *supra*.

[9] United States v. Carpenter, 1 M.J. 384 (C.M.A. 1976). *But see* United States v. Tangpuz, 5 M.J. 426 (C.M.A. 1978). (Wherein J. Cook lists additional considerations); Holdaway, *Litigating Defense Requests for Witnesses* The Army Lawyer, Apr. 1975, at 17.

[10] United States v. Carpenter, *supra*, at footnote 8.

[11] 3 M.J. 436 (C.M.A. 1977).

[12] *Id.*

[13] United States v. Arias, *supra* at 438 (" . . . we have applied [para. 115*a*] in ways that leave no doubt that an accused's right to secure the attendance of a material witness is free from the substantive control by trial counsel.")

[14] Rule 17(b), Fed. Rules Crim. P., which permits an indigent defendant to obtain subpoenas "upon an *ex parte* application . . . upon a satisfactory showing that . . . the witness is necessary to an adequate defense."

[15] The upshot of such *ex parte* hearings would be the granting of continuances during the trial in order to allow Government counsel time to properly interview previously unknown defense witnesses and to marshall evidence with which to impeach such persons. In addition to being of dubious value to the accused, such procedure is not constitutionally mandated when there exists a scheme of reciprocal discovery by which the prosecutor must disclose to the defense the names and expected testimony of his witnesses, including those to be called on rebuttal. Wardius v. Oregon, 412 U.S. 470 (1973). This issue may be resolved by the Court of Military Appeals when it decides United States v. Vietor, 3 M.J. 952 (N.C.M.R. 1977), *pet. granted* 5 M.J. 254. *See also* Melnick, *The Defendant's Right to Obtain Evidence: An Examination of the Military Viewpoint* 29 Mil. L. Rev. 1 (1965).

The Standard-Materiality

Production of defense requested witnesses has never been an unlimited right. The Supreme Court has long held that there is no constitutional right to subpoena witnesses whose testimony is not material to the accused's defense.[16] Unfortunately, the Supreme Court has never formulated a federal standard of materiality and the Manual for Courts-Martial has always defined the term as being synonomous with "relevance."[17] In *United States v. Hampton*,[18] the Court of Military Appeals attempted to clarify this issue by declaring a witness to be "material" when there exists a reasonable likelihood that his testimony will have an effect on the judgment of the fact-finders at trial. "Accordingly, though a witness' testimony may be favorable and relevant to a defendant's case, he has no right to produce that evidence if the impact of its exclusion will be too insignificant in the context of the other evidence presented at trial to have any material bearing on the outcome."[19] Although this standard was designed primarily as a test to be applied by appellate courts in determining on review whether a witness should have been produced at trial, it provides an equally valuable standard for those practicing in the trial arena.

The Sanction-Abatement

The point of greatest confusion pertaining to witness production had its genesis in the case of *United States v. Carpenter*.[20] There the accused, charged with making a false claim, requested that his former company commander be produced as a general character witness on the merits. Because the requested officer was attending school at Fort Gordon, some 800 miles from the trial situs at Fort Hamilton, the convening authority denied the witness stating that "military necessity" made him unavailable. In reversing the conviction, the Court of Military Appeals per Judge Cook unanimously held that "materiality" alone was the standard to be applied with regard to this issue, and that once materiality was established the government had to produce the witness or abate the proceedings.[21]

One year later the Court in *United States v. Willis*,[22] extended the "produce or abate" standard to situations wherein accused requested witnesses whose testimony was material on the issue of sentencing only.[23] Stating that materiality is not susceptible of gradation, Judge Perry and Chief Judge Fletcher rejected the argument that materiality must be measured against the cost and inconvenience to the government in producing live witnesses at trial. Judge Cook in dissent, however, took exception to the Court's decision and in a moment of rare judicial self-castigation apologized for coining the "egregious" rubric of "produce or abate." He went on to explain that his decision in *Carpenter* did not establish a new principle in this area, but adhered to existing precedent

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[16] Washington v. Texas, *supra*.

[17] "As used in this manual with reference to pertinency of evidence, 'material evidence' has the same meaning as 'relevant evidence.'" Para. 137, MCM. Under the new military rules of evidence there is no distinction made between "relevant" and 'material' evidence. Rule 401, Mil. R. Evid.

[18] 7 M.J. 284 (C.M.A. 1979).

[19] This quotation is taken from Westen, *Compulsory Process II*, 74 Mich. L. Rev. 191, 214 (1975), an article cited by C.J. Fletcher in United States v. Hampton, supra.

[20] 1 M.J. 384 (C.M.A. 1976).

[21] Court of Military Appeals has never defined the term "abate." Black's Law Dictionary at page 16 (4th ed. 1968) defines it to mean that "action is utterly dead and cannot be revived except by commencing a new action." Others interpret it to mean that the proceedings must be indefinately continued. In practical terms an abated court-martial would most likely result in withdrawal of charges by the Government or dismissal by the military judge.

[22] 3 M.J. 94 (C.M.A. 1977).

[23] Earlier, in *United States v. Manos, supra*, the Court had held that military defendants, unlike their civilian counterparts in federal court, were entitled to present witnesses during the sentencing phase of the trial. According to the Court, this right stems from Art. 46 and the bifurcated court-martial process provided for by Para. 75 of the *Manual*.

which had always allowed for alternatives to corporeal witness production under appropriate circumstances.[24]

The Court's ruling in *United States v. Williams*,[25] indicated that Judge Cook's recantation in *Willis* had not been made in vain. Although Judge Perry's lead opinion, joined in by Chief Judge Fletcher, specifically reaffirmed the "produce or abate" standard it backed off from that position in dictum by stating that the live presence of material witnesses is unnecessary when the testimony of such witnesses would be merely cumulative.[26]

Next came *United States v. Tangpuz*.[27] There the accused had requested the presence of four previous commanders as character witnesses on sentencing. Ruling that the witnesses were cumulative, the military judge ordered only one to be produced and that the testimony of the others be admitted through previously prepared fitness reports. In ruling that the military judge had not abused his discretion, Judge Cook's lead opinion again rejected the "produce or abate" language of *Carpenter*. Moreover, Judge Cook denied the existence of an "inelastic rule" for determining when an accused is entitled to the personal attendance of a witness at government expense, and rejected the premise that materiality alone is the talisman for making such a determination. Instead, he opined that the following relevant factors should be considered by the trial judge when ruling on witness requests: (1) the issues involved in the case and the importance of the requested witness to those issues; (2) whether the witness is desired on the merits or on sentencing; (3) whether the witness' testimony would be merely cumulative; and (4) the availability of alternatives to the personal appearance of the witness. Unfortunately, the other court members concurred only in the result of this case and Judge Cook's guidance can therefore be read as providing a statement of his position only.

United States v. Scott[28] was decided on the same day as *Tangpuz*. Chief Judge Fletcher authored the lead opinion in which Judge Perry concurred. In dicta the Chief Judge reaffirmed the "produce or abate" standard but then went on to say that "although live testimony . . . is normally imperative to the fairness of the process, occasionally some alternative form of testimony will pass muster under the facts and circumstances of a given case."[29] He further remarked that it is within the discretion of the military judge to determine the mode of evidence production, once the witness' materiality has been established; and that in exercising this discretion the judge must insure that the mode of production does not diminish the *fairness of the proceedings*.[30] With this dicta all three

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[24] Judge Cook's recantation was well-founded, especially with regard to witnesses requested during the sentencing phase of the trial. In United States v. Manos, supra, the Court had specifically recognized the need to "weigh the relative responsibilities of the parties against the equities of the situation" in deciding whether or not requested witnesses should be physically produced. In condemning the convening authority's apparent summary denial of accused's witness request, the Court said: "We suggest that this record shows little attention being given to the possibility of further delaying the proceedings or obtaining a better *substitute* for their testimony than that afforded by the single letter which defense counsel was able to produce."

[25] 3 M.J. 239 (C.M.A. 1977). In *Williams* the accused had been charged with heroin possession and the defense case rested on the credibility of accused's denial of guilt. Four defense character witnesses on the merits were requested, but the trial judge denied the request as to two of them on the basis that their testimony was merely cumulative. The Court of Military Appeals reversed the conviction because the denied witnesses had known accused at different periods of time and were therefore not cumulative under those circumstances.

[26] In footnote 8 the Court cautioned that the trial judge must be careful to distinguish between cumulative witnesses and corroborative witness—the latter being witnesses whose repetitive testimony would have an "important impact" on the fact-finder at trial. Such witnesses presumably must be produced if the trial's fairness would be affected by their absence.

[27] 5 M.J. 426 (C.M.A. 1978).

[28] 5 M.J. 431 (C.M.A. 1978).

[29] *Id.* at 432.

[30] *Id.*

members of the court, as then constituted, acknowledged for the first time their agreement in one significant respect: abatement of proceedings is not the only alternative to live production of material witnesses. Unfortunately, this defacto agreement has never been formalized by a unanimous opinion.

Possible Alternatives

In the wake of *Tangpuz* and *Scott* the question confronting the practitioner is what, if any, alternatives to live witness production are available? And if alternatives do exist when can they be employed? Depositions, stipulations, and former testimony are three possible alternatives that immediately come to mind. Let us consider each in more detail.

Depositions

In *United States v. Thornton*[31] the Court of Military Appeals considered whether an accused could ever be forced to accept a deposition in lieu of the live presence of a requested witness. The accused in *Thornton* was charged with larceny and the requested witness' testimony was material on the issue of accused's specific intent to steal. Because the testimony sought went to the "core" of accused's defense, the Court held that the accused could not be forced to present the testimony by way of deposition, but was entitled to have the witness testify directly from the witness stand.

In *United States v. Manos*[32] the Court of Military Appeals implied that the mandate of *Thornton* did not necessarily apply to defense witnesses requested on extenuation and mitigation. There the accused requested that four former petty officers, one of whom was then a civilian, be made available to testify as character witnesses on sentencing. All four witnesses were located far from the situs of the trial, and three of them were deployed at sea. In condemning the convening authority's refusal to produce the requested witness, the Court held that it was an abuse of discretion "not to have made the witnesses available or, at the least, [have] *provided for taking their depositions.*"[33]

It is significant to note that *Manos* did not announce new law but rather reinforced a position taken by the Court three years earlier in *United States v. Sweeney.*[34] In that case the Court cautioned that the personal appearance of character witnesses was not always necessary and expressly pointed out that "testimony on the merits differs widely from that offered on extenuation and mitigation."[35] *Manos* therefore simply expanded *Sweeney* by recognizing the appropriateness of using a deposition as a substitute for testimony on sentencing when special difficulties in procuring the witness' presence exist.[36]

Stipulations

The Government's use of stipulations in lieu of live testimony is also circumscribed by law. Although Paragraph 48*d* of the Manual states that defense counsel should, in the interest of saving time, labor, and expense, "cooperate with trial counsel in the preparation of . . . appropriate stipulations as to unimportant or uncontested matters," Paragraph 154*b* allows either party to withdraw from a stipulation at

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[31] 8 C.M.A. 446, 24 C.M.R. 256 (1957).

[32] 17 C.M.A. 10, 37 C.M.R. 274 (1967).

[33] 17 C.M.A. 10, at 16; 37 C.M.R. 274, at 280.

[34] 14 C.M.A. 599, 34 C.M.R. 379 (1964).

[35] 14 C.M.A. 599, at 607; 34 C.M.R. 379, at 386.

[36] To the practitioner, the significance of *Manos* and *Sweeney* may be minimized by the fact that securing a deposition in lieu of a single live witness will invariably cost more than producing the witness. This is so because the Court of Military Appeals in United States v. Jacoby, 11 C.M.A. 428, 29 C.M.R. 244 (1960) held that written depositions in the form of interrogatories cannot be taken over accused's objection. As a result, both accused and his counsel have a right to be present during the taking of any deposition. In spite of the cost of securing such a deposition, its use would seem preferable to the alternative of abatement if the requested witness is beyond the court's process and unwilling to appear voluntarily. *See generally* Everett, *The Role of the Deposition in Military Justice*, 7 Mil. L. Rev. 131 (1960); Everett, *The Fast-Changing Law of Military Evidence*, 12 Mil. L. Rev. 89 (1961).

any time before the stipulation is received into evidence. Simply put, the accused can never be forced to enter into a stipulation with the government.[37]

It is important to consider at this juncture the effect of the Government's willingness to concede the factual nature of a requested witness' proposed testimony. For example, if an accused convicted of larceny requests his mother as a character witness on sentencing to testify concerning his past good conduct as a civilian, can the Government avoid producing this witness by conceding the truth of her expected testimony? No firm answer in military law presently exists. Judge Cook, dissenting in *United States v. Willis,* argues that such a concession can usually be an effective substitute for the actual witness.[38] By conceding the truth of the proposed testimony, the credibility of the requested witness ceases to be a relevant issue and no purpose is served by allowing the court to view the witness in the flesh.[39] This position, however, is contrary to the general rule that a party cannot be required to accept a judicial admission of its adversary, but may insist on proving the fact in issue. To allow otherwise, it is argued, would deprive a party of the "legitimate moral force" of its evidence.[40]

In the federal courts this issue has been considered in the light of interpreting Rule 403 of the Federal Rules of Evidence[41] which allows for the exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time. In the recent case of *United States v. Grassi*[42] the Fifth Circuit was required to rule whether an accused charged with interstate transportation of obscene films could prevent the Government from showing the films to the jury by simply stipulating to their obscenity. Sustaining the trial judge's refusal to force Government acceptance of the stipulation, the Court rejected a *per se* approach, but held instead that every case must be considered separately. In so doing the Court recognized the trial judge's power under proper circumstances to compel Government acceptance of a defense tendered stipulation.

Whether this power is equally applicable in forcing the defense to accept a Government concession pertaining to a requested witness' proposed testimony is arguable. There is nothing to imply, however, that Rule 403 was ever designed to preclude the military trial judge from balancing the merits of live witness production against the delay, waste of time, and needless presentation of cumulative evidence that such production creates when the Government is willing to concede the truth of the witness' proposed testimony.

Former Testimony

Former testimony is a well recognized exception to the hearsay rule usually employed by the government in order to introduce testimony that would otherwise be suppressed because of the witness' unavailability at trial. In *United States v. Willis,*[43] however, the government attempted to use former testimony as a substitute for the live production of defense requested witnesses. There the convening authority ordered a rehearing on the sentence and the accused requested that four character witnesses from the previous trial be produced to testify. One of the witness was a civilian beyond the Court's subpoena process, two were deployed at sea, and one was posted half way across the world. In denying accused's request,

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[37] United States v. Thornton, 24 C.M.R. 256 (C.M.A. 1957).

[38] United States v. Willis, *supra* at 98.

[39] *See* Annot., 9 A.L.R.3d 1180, 1225-36 (1966).

[40] United States v. Grassi, 602 F.2d 1192 (5th Cir. 1979).

[41] Rule 403 which has been adopted verbatim in the Military Rules of Evidence states:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

[42] 602 F.2d 1192 (5th Cir. 1979).

[43] 3 M.J. 94 (C.M.A. 1977).

the convening authority balanced the benefits to the accused of live witnesses against the problems posed by procuring them. The Court of Military Appeals rejected this approach, holding that military convenience is never a proper basis for denying a material witness even if adequate alternatives to corporeal production are available. The fact that the witnesses were *apparently* cumulative and requested for sentencing only was of no consequence.

The precedential significance of *Willis* would seem to have dissipated with the Court's subsequent, unanimous holding in *Tangpuz*. There the trial judge, confronted by a similar problem, ruled that the requested witnesses were cumulative and ordered the production of one witness and allowed fitness reports to serve in lieu of the others. In the wake of *Tangpuz*, *Willis* should be viewed as an improperly decided cumulative witness case, and not as a complete rejection of former testimony as an alternative to live witness production.[44]

Summary

Viable alternatives to live witness production, although limited in applicability do exist; the only condition to their use being that they not undermine the trial's fairness. Additionally, it seems clear that the use of alternatives is more appropriate during the sentencing phase of a court-martial than during the trial on the merits.

Depositions, stipulations, concessions, and former testimony are all traditional alternatives to live witness production, but in this era of modern technology new alternatives should be explored for improving the administration of criminal justice while simultaneously insuring that fairness is not undermined. To this end, the use of videotaped testimony during the sentencing phase of a court-martial would seem to be a twentieth century solution to a problem plaguing a modern, mobile, widely dispersed military force.[45]

Conditions Precedent to Enforcement of Right

Having discussed the standard which governs compulsory process and the manner by which witnesses may be produced, let us now consider the conditions which must be met before the military judge will grant such requests. Essentially, two requirements exist: (1) the accused must make a showing of materiality, and (2) the request must be timely.

Averment of Materiality

In *United States v. Lucas*,[46] the Court of Military Appeals held that the Government

[44] It is important to note that former testimony can never be used unless a showing is made that the witness whose former testimony is to be used is "actually unavailable." United States v. Gaines, 20 C.M.A. 557, 43 C.M.R. 397 (1971). Unavailability under the Military Rules of Evidence is defined by Rule 804(a) and will include, among other things, witnesses whose absence is due to "military necessity." The Court of Military Appeals in United States v. Davis, 19 C.M.A. 217, 41 C.M.R. 217 (1970) established that distance alone never makes a service person unavailable to serve as a witness, but distance in conjunction with operational requirements could, under proper circumstances, arise to the level of a military necessity. What sort of operational requirements short of combat, constitute a military necessity are yet undetermined.

[45] Use of videotapes at criminal trials in lieu of live witness production, although not widespread, is not without precedent. For example, Judge Thomas MacBride in 1975 ordered President Ford to submit to a videotaped deposition for the trial of Lynette Fromme in lieu of subpoenaing him to testify at trial. N.Y. Times, Oct. 29, 1975, at 12 (city ed.). Videotaped depositions are used on a regular basis in civil trials. King v. Westlake, 264 Ark. 555, 572 S.W.2d 841 (1978). Rule 1001 of the Military Rules of Evidence specifically allows for the admission of videotapes. The commentators have also uniformly called for increased employment of technology within the trial arena. *See* Short, Florence, and Marsh, *An Assessment of Videotape in the Criminal Courts, in Symposium: The Use of Videotape in the Courtroom,* 1975 Brigham Young L. Rev. 423, 455; Barber and Bates, *Videotape in Criminal Proceedings,* 25 Hast. L. J. 1017, 1030-36 (1974); Note, Videotape Depositions: An Alternative to the Incarceration of Alien Material Witnesses, Calif. Western Int. L.J., 11:239-54, Winter 1980.

[46] 5 M.J. 167 (C.M.A. 1978).

need not produce a requested defense witness until accused makes some legitimate averment of materiality which places the military judge on notice that the witness will offer testimony to negate the prosecution evidence or support a defense. This requirement exists independently of Paragraph 115*a* and is premised on the military judge's need for reliable information upon which to make his determination of whether to order the witness produced. What constitutes a legitimate averment, however, has never been clearly established. In *United States v. Lucas* at footnote 11 the Court obliquely addressed this issue by citing *Greenwell v. United States*,[47] wherein the District of Columbia Circuit Court of Appeals laid down the following rule:

> If the accused avers facts which, if true, would be relevant to any issue in the case, the requests for subpoenas must be granted, unless the averments are inherently incredible on their face, or unless the Government shows, either by introducing evidence or from matters already of record, that the averments are untrue or that the request is otherwise frivolous.[48]

Counterposed to *Greenwell* is the Air Force Court of Military Review's decision in *United States v. Young*[49] where the Court held that the military judge did not err in refusing to compel the attendance of requested witnesses when the defense conceded that no effort to communicate with them had been made and where counsel could only speculate as to what the requested witnesses would say. According to the Court, such "hopes" as to expected testimony did not equate to a legitimate averment and witness production was therefore not required.

In *United States v. Carey*,[50] the Air Force Court considered a similar problem with the exception that the request was based entirely on the accused's uncorroborated personal representations of what the witness would say. In upholding the trial judge's decision to deny the witness, the court stated:

> If the defense truly desired the witness to appear, in our judgement they had a responsibility to exert at least a minimal effort to contact them and verify their alleged anticipated testimony. A recitation of such activity, together with the information obtained thereby, or an assertion of lack of success in spite of such efforts, should then have been presented to the military judge in support of the motion.[51]

Greenwell, *Young* and *Carey* are in apparent conflict as to who has the burden of establishing the sufficiency of an averment, and at first blush appear irreconciliable. A close reading of *Lucas*, however, reveals that to be acceptable an averment must be "legitimate," and citing *Greenwell* it declares that false, frivilous, and inherently incredible averments fall short of this standard. The linchpin for establishing the legitimacy of a request, therefore, seems to be whether or not the averment is reliable, regardless of how established. By using reliability as a standard the military judge is free to consider all circumstances surrounding an averment and rule accordingly. For example, if the defense requests a witness based only on accused's uncorroborated assertion of the witness' expected testimony, the military judge must decide how reliable the averment is before ruling on the request. Factors to be considered are the time, manner, and place of accused's communication with the witness, the specifics of the proposed testimony, and finally the efforts made to substantiate accused's statements. If no significant defense efforts were made to verify a witness' testimony, the military judge should be allowed to consider

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[47] 317 F.2d 108 (D.C. Cir. 1963).

[48] Id at 110.

[49] 49 C.M.R. 133 (A.F.C.M.R. 1974); *Accord.* United States v. DeAngelis, 3 C.M.A. 298, 12 C.M.R. 54 (1953).

[50] 1 M.J. 761 (A.F.C.M.R. 1975).

[51] *Id.* at 767.

this in his deliberations. Success in contacting the witness, however, should not be dispositive, and failure to communicate with the witness after a good faith effort to do so has been expended should be considered as well. If after considering all the evidence the military judge determines that a reliable basis exists to believe that the requested witness has testimony to offer which could have an effect upon the fact-finders, accused's requirement to make a legitimate averment will have been met. The trial judge must then determine the manner in which this testimony will be presented, a matter previously discussed in this article.[52]

Request Must be Timely

In discussing timeliness of requests for defense witnesses, the Court of Military Appeals in *United States v. Hawkins*[53] said:

> the touchstone for untimeliness should be whether the request is delayed unnecessarily until such a time as to interfere with the orderly prosecution of the case. Even then, if good cause is shown for the delay, a continuance should be granted to permit the evidence to be produced.[54]

Hawkins suggests a strong bias toward witness production and points out that underlying every untimely witness request is the question of whether to grant a continuance to allow production of the witness, a matter within the military judge's discretion, reviewable only when denial is arbitrarily made.[55]

In *United States v. Nichols*,[56] the Court declared that a continuance should ordinarily be granted "if it appears reasonable that it is not made on frivilous grounds or solely for delay." Furthermore, "counsel for accused has the responsibility to make a full and fair disclosure of the necessity for, and the nature, extent and *availability* of, the desired evidence" which forms the basis of the request. Two factors emerge from *Nichols* as requirements to be met before the trial judge will be compelled to grant a continuance: (1) demonstrated good faith on the part of the requestor, and (2) a showing of the desired witness' availability.

In accessing whether bad faith exists the military judge should consider, among other things, the accused's general diligence in seeking out witnesses,[57] when the desired witness first came to accused's attention, the timing of the initial request for a continuance, and the number of continuances previously granted.

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[52] Recently in *United States v. Killebrew*, 9 M.J. 154 (C.M.A. 1980), the newly constituted Court of Military Appeals reaffirmed the accused's unconditional right to interview all potential witnesses prior to trial, but in so doing restated the general proposition that a witness may refuse to answer questions of defense counsel so long as the government has not induced that refusal. It went on to say, however, that "when there is *some reason to believe that a witness has knowledge relevant to criminal charges* and he refuses to talk to defense counsel, there usually will be lacking any "good cause" to forbid his deposition or to refuse *to compel his appearance at trial.*" This opinion is in accord with United States v. Christian, 6 M.J. 624 (A.C.M.R. 1978) wherein the Army Court of Military Review ruled that even though the defense was uncertain as to what a requested witness would say, an adequate showing of materiality had been made when both the trial and defense counsel agreed that if the witness had any testimony to provide at all, that it would support either the government or defense theory. As such, the witness was material and should have been produced. This result could possibly have been avoided had the military judge treated accused's witness request as a request for a continuance and thereafter allowed the defense additional time to secure the information required to support its request. *But see* Holdaway, *Litigating Defense Requests for Witnesses*, the Army Lawyer, Apr. 1975, at 17.

[53] 6 C.M.A. 135, 19 C.M.R. 261 (1955).

[54] This liberal approach to granting of continuances where good cause for delay exists continues to be sanctioned by military appellate courts. United States v. Daniels, 11 C.M.A. 52, 28 C.M.R. 276 (1959); United States v. Humphrey, 4 M.J. 560 (A.C.M.R. 1977); United States v. Green, 2 M.J. 823 (A.C.M.R. 1976); United States v. Sargent, *9* M.J. ___ (A.C.M.R. 1980).

[55] United States v. Dunks, 1 M.J. 254 (C.M.A. 1976); Conmy v. United States, 20 C.M.A. 282, 43 C.M.R. 122 (1971); United States v. Potter, 14 C.M.A. 118, 33 C.M.R. 330 (1963).

[56] 2 C.M.A. 27, 6 C.M.R. 27 (1952).

[57] Primary responsibility for locating known defense witnesses naturally falls upon the accused. The extent to

As for the issue of witness availability, the military judge must decide the likelihood of the requested witness' ability to personally testify within a period that would allow for the "orderly prosecution of the case."[58] How long a delay will be allowed is a matter to be decided by the trial judge in each case based on the attendent circumstances. Indefinite delays or abatement of the proceedings may at times be required, but this will not always be the case. For example, if the requested witness is dead or his whereabouts unknown, the judge need not abate the proceedings. Indeed, anything more than a nominal delay to discover the "lost" witness would probably be unnecessary. This is so because the compulsory process clause was never designed to require the Government to achieve the impossible, and the fairness of a trial cannot be assailed when all good faith, reasonable efforts are made to assist accused in marshalling his evidence.[59]

Conclusion

We have considered both the substantive and procedural aspects of compulsory process, and although no litmus exists to answer all the questions posed, several definite conclusions can be drawn. There can be no doubt that a determination of a witness' materiality must be the threshold question in assessing whether or not an accused's right to compulsory process exists. In deciding this issue the military judge must assess the reasonable likelihood that the witness' testimony will have an effect upon the court's ultimate judgment. Put another way, is it reasonable to believe that the court would decide the issue otherwise if the witness did not testify? Factors such as the offenses charged, the defenses raised, the credibility of other witnesses, as well as the cumulative nature of proffered testimony must all be considered by the trial judge in making this determination.

After a witness is determined to be material, the mode of evidence presentation must be addressed. As a general proposition, a material defense witness on the merits will always have to be produced at trial if the witness is alive, his whereabouts known, and his person subject to the court's process.[60] Such a strict standard,

which the Government must expend its resources to assist accused in this regard is yet unresolved. It would seem, however, that to the extent the Government possesses special advantage or expertise in locating absent witnesses, it must exert good faith efforts to find and subpoena such persons. United States v. Kilby, 3 M.J. 938 (N.C.M.R. 1977); United States v. Davison, 4 M.J. 702 (A.C.M.R. 1977); United States v. Bright, 9 M.J. ___ (A.C.M.R. 1980); United States v. Killebrew, 9 M.J. 154 (C.M.A. 1980).

[58] United States v. Hawkins, *see* note 53, *supra*.

[59] As Dean Wigmore once commented, "The Constitution cannot raise witnesses from the dead, nor spirit them from beds of illness, or kennels of concealment. To interpret the Constitution into any such pledge is to invent (as experience has shown) a guarantee that no determined offender shall be tried for his crime until he himself pleases." 9 J. Wigmore, Evidence, Sec. 2595, at 605-06 (3d ed. 1940).

[60] The question of what happens when the requested witness is beyond the process of the court is one which continues to plague the military. Before this problem can be resolved, however, an understanding of the scope of military process is required. Article 46, U.C.M.J., provides that process issued in court-martial cases shall be similar to that issued by United States district courts and shall run to any part of the United States, its territories, commonwealths, or possessions. As such, when the requested witness and the military court issuing process are both located within the United States or its possessions, statutory provisions exist to compel the witness' presence at trial (See Note 7). Under 28 U.S.C. § 1783 (1976), made applicable to the armed forces through Article 46, military authorities can also subpoena American citizens from throughout the world to appear before courts-martial held within the United States or its possessions. In contrast, neither Article 46 nor any other federal law grants power to the military to force a civilian residing in the United States to attend a court-martial held in a foreign country. United States v. Boone, 49 C.M.R. 709 (A.C.M.R. 1975). With regard to American citizens, therefore, process exists whenever the court is held within the United States or its possessions. For trials held in a foreign country, however, it may be necessary to change the court's venue (either permanently or temporarily) in order to secure attendance of a requested American witness. For example, in United States v. Daniels, 23 C.M.A. 94, 48 C.M.R. 655 (1974), venue could have been changed from Belgium to CONUS in order to force an American witness to ap-

(Continued on p. 32)

however, may not always be applicable to witnesses required only on sentencing. Alternatives such as stipulations, depositions, concessions, affidavits, official records, and videotaped testimony can be presented in lieu of live courtroom testimony as long as the fairness of the proceeding is not affected, a decision left to the discretion of the military judge.

Before a subpoena will issue an accused must make a timely request to the court containing a specific, detailed averment of the witness' expected testimony. Again, the military judge will decide the issue of timeliness and the sufficiency of the averment based on the criteria previously discussed.

Although the production of defense witnesses will continue to be a difficult and expensive proposition in a criminal justice system that literally spans the entire globe, reasoned application of the legal standards established by both Congress and the courts will insure that neither the soldier's rights nor the administration of military justice are adversely affected.

Administrative and Civil Law Section

Administrative and Civil Law Division, TJAGSA

The Judge Advocate General's Opinions

(Boards And Investigations) **Where The Governing Regulation For an Investigation Does Not Make AR 15-6 Applicable, The Appointing Authority Can Determine The Extent To Which AR 15-6 Will Be Applied.** DAJA-AL 1980/1122, 21 February 1980.

The Office of The Surgeon General requested an opinion from The Judge Advocate General regarding the appointment of an investigating officer and the conduct of an inquiry into alleged violations of the "Anti-Deficiency Act" (31 U.S.C. § 665, RS 3679). The Judge Advocate General determined that, because AR 37-20, the primary source of Army policy concerning such investigations, is silent regarding the applicability of AR 15-6 procedures, adherence to AR 15-6 is mandatory only to the extent directed by the appointing authority in the letter of appointment. Further, any conflicts between AR 37-20 and AR 15-6 are to be resolved in favor of AR 37-20 (para. 1-1a, AR 15-6).

The appointment of a Board of Officers UP AR 37-20 is a matter of command responsibility (para. 17a, AR 37-20). In this case, an investigating officer was purportedly appointed by The Surgeon General. The Judge Advocate General advised that the Board be appointed by an appropriate commander having responsibility for the administrative control of the funds involved in the allegations. If a portion of the investigation was already accomplished by an improperly appointed board or investigating officer, the data gathered (less any findings or recommendations) may be employed by a properly appointed Board of Officers to the extent that the board considers it relevant.

The Judge Advocate General further advised that the appointing authority may request that personnel outside his command be provided to serve as Board members or as an investigating officer, and that there is no requirement that such officers, if made available by their superiors, have to be attached or detailed to

(Footnote, continued)

pear. Likewise, in United States v. Boone, *supra*, venue could have been transferred from Germany to Conus in order to compel an American witness in CONUS to appear. If a foreign witness over whom we have no process is requested, Mancusi v. Stubbs, 408 U.S. 204 (1972) holds that there exists no governmental duty to request the cooperation of foreign authorities in securing the witness' presence. Under existing SOFA agreements, however, such requests as well as other reasonable good faith efforts to secure the witness' voluntary attendance would be required. Barber v. Page, 390 U.S. 719 (1968). If such efforts fail, however, the witness will be deemed unavailable as if he had died or disappeared, and no obligation exists to dismiss or abate the prosecution. Virgin Islands v. Acquino, 378 F.2d 540 (3d Cir. 1967); United States v. Bentvena, 319 F.2d 916 (2d Cir.), *cert. denied*, 375 U.S. 940 (1963); Gillars v. United States, 182 F.2d 962 (D.C. Cir. 1950).

that command in order to be vested with investigative authority.

Additionally, The Judge Advocate General found no regulatory requirement that the formal procedures of AR 15-6 be employed in an investigation conducted under AR 37-20; whether formal procedures should be employed is within the appointing authority's discretion. Regardless of whether formal or informal procedures are employed, any individual who is suspected of misconduct, or otherwise considered responsible for the violation, should be advised of his rights IAW para. 19a, AR 37-20 before being asked to give any statement. Further, although not specifically required by AR 37-20, The Judge Advocate General advised that the administration of an oath to each witness before testifying is considered good practice.

(Separation From The Service, Grounds) **Separation Of A Servicemember Adjudicated A Juvenile Offender For An Offense Not Involving Moral Turpitude Is Improper Unless Commander, MILPERCEN, First Grants An Exception.** DAJA-AL 1980/1176, 25 February 1980.

The ABCMR requested an opinion from The Judge Advocate General as to whether a servicemember was properly separated because of civil conviction. The servicemember was adjudged a youthful offender for the crime of armed robbery, committed when he was twenty years old. Subsequently, a board of officers convened to consider whether he should be discharged for civil conviction. The board recommended that the servicemember be separated with a general discharge but further recommended a six month suspension of the separation, a transfer to another unit, and a bar to reenlistment. The authority approved the discharge recommendation and ordered the servicemember separated.

The Judge Advocate General determined that paragraphs 14-12*c* and 14-19, AR 635-200, construed together, prohibit separation of an individual adjudicated a juvenile offender for an offense not involving moral turpitude absent the granting of an exception to policy by the Commander, MILPERCEN. The Judge Advocate General noted that factors distinguishing this case from DAJA-AL 1972/4559, 27 July 1972, and DAJA-AL 1971/5679, 30 December 1971, are that the servicemember was processed separately from the adult system and was required to give up his right to a jury trial, and that the Alabama Code specifically states that this is an adjudication, not a conviction. Therefore, absent the granting of the exception, the separation by the local discharge authority was improper. Since the discharge was invalid (i.e., without authority), there was no basis for changing the discharge or upon which to base a constructive discharge, the servicemember having not acquiesed in any discharge status. Accordingly, the ABCMR could either reinstate the servicemember or recommend a convenience of the Government discharge.

Additionally, The Judge Advocate General stated that the convening authority was not bound by the board's recommendation that the discharge be suspended, as that was not a "required" recommendation UP paragraph 1-24*a*, AR 635-100.

(Line Of Duty) **Injuries Suffered By Reservist Performing Duties Incidental To Scheduled Drill Were Incurred While Employed In Performance Of Inactive-Duty Training.** DAJA-AL 1980/1210 (5 March 1980).

A Staff Judge Advocate requested an opinion of The Judge Advocate General as to whether injuries suffered by a reservist who was performing duties "incidental" to a scheduled drill were incurred while employed in inactive-duty training. A reservist, not on active-duty, had received verbal orders to perform administrative duties at the local Army Reserve Center the night before a scheduled drill. While walking across the parking lot at the Center, he slipped and fell, sustaining injuries to his arm. The Judge Advocate General considered 10 U.S.C. § 3721(2), which provides that a reservist is entitled to hospital benefits when he is called or ordered "to perform inactive-duty training, for any period of time, and is disabled

in line of duty from injury while so employed." He determined that, consistent with prior opinions and *Meister v. United States,* 162 Ct. Cl. 667, 319 F.2d 875 (1963), that facts of this situation provided a sufficient nexus to the scheduled drill the following day so as to entitle the reservist to hospital and medical benefits. However, the Comptroller General, disagreeing with the Court of Claims, has requested that all such cases be forwarded to the Comptroller General for resolution (43 Comp. Gen. 412 (1963)). Accordingly, The Judge Advocate General advised the Staff Judge Advocate to have the local finance and accounting officer forward the case to the Comptroller General for decision UP paragraph 11-3*a*, AR 37-103.

(Duty Status) **A Servicemember May Be Assessed Time Lost For Days Spent In Civil Confinement, Even When No Final Conviction Occurs, If The Member Was Absent Without Authority At Time Confinement Initiated.** DAJA-AL 1980/1326, 27 February 1980.

The Commander, USAEREC, requested an opinion from The Judge Advocate General as to whether a servicemember was erroneously charged with time lost for 295 days spent in civilian due to a charge of armed robbery which ultimately was dismissed. The servicemember was absent without authority when he was apprehended by civilian authorities. During the entire period of confinement, the servicemember's status was reported as "AWOL CONFINED CIVIL AUTHORITIES".

The Judge Advocate General determined that a member who is confined by civil authorities, but was not release to them by military authorities, may be assessed time lost UP 10 U.S.C. § 972 (2) even in the absence of a final conviction, provided that there is an administrative determination that the absence in confinement was without proper authority or was due to the member's misconduct. The Judge Advocate General found that both of these contingencies were met in this case. There had been a determination that the servicemember was absent without authority immediately prior to and throughout the period in question, and, absent contrary evidence, his confinement by civil authorities, commenced while in an AWOL status, was due to his misconduct. Accordingly, The Judge Advocate General concluded that the assessment of time lost in this case was lawful.

Legal Assistance Items

Major Joel R. Alvarey, Major Joseph C. Fowler, and Major Walter B. Huffman
Administrative and Civil Law Division, TJAGSA

Truth In Lending—Self-Representation And Attorney's Fee Awards

The United States Court of Appeals, Fourth Circuit, has adopted a simple rule for Truth In Lending actions: "Plaintiffs who are not represented by attorneys may not be awarded attorney's fees." *White v. Arlen Realty and Development,* 614 F.2d 387 (4th Cir. 1980).

The Fourth Circuit reversed the judgment of the district court awarding appellant, who was a lawyer, attorney's fees for his self-representation at trial. The court determined that § 1640(a)(3) of the Truth In Lending Act does not allow an award of attorney's fees to plaintiffs who are lawyers and represent themselves. The rationale of the decision was that the goals of TILA are not fostered by self-representation and fee generation, but rather by independent, objective professional advocacy.

Truth in Lending Act/Regulation Z—Layaway Plans

A layaway plan under which the customer agrees to make payments according to a specified payment schedule does not necessarily constitute a credit transaction subject to Regulation Z. FRB Letter of October 23, 1978, No. 1317,

CCH Consumer Credit Guide, Para. 31,830, p. 67,003, May 27, 1980.

§ 226.201 of Regulation Z states that purchases made under a layaway plan do not fall within the scope of Regulation Z where "the customer has no contractual obligation to make payments and may, at his option, revoke a purchase made under the plan and request and receive prompt refund of any amounts paid toward the cash price of the merchandise." In an unofficial FRB staff interpretation, the FRB stated that the layaway plan in question created "no contractual obligation to make payments" since the only consequence of failure to pay is the return of the merchandise to stock and a full refund to the customer.

Federal Labor Relations-Scope Of Bargaining-Federal Labor Relations Authority Will Render A Negotiability Determination Only If The Petition Contains A Specific Contract Proposal. *AFGE, Local 2991 and Social Security Administration, El Paso, Texas,* 2 FLRA 79 (1980).

The union requested negotiations on the statistical forms to be implemented for accountability of various groups of employees. The activity refused to negotiate the matter until the union submitted a specific proposal outlining exactly what was desired.

The union failed to provide the proposal, opting to submit a petition for a negotiability determination to the Authority instead. The Authority dismissed the petition because it did not meet the conditions for review under section 7117 of the Civil Service Reform Act of 1978 and section 2424.1 of the Authority's rules and regulations. The petition was deficient because it did not include a "proposal" sufficiently specific and delimited in form and content as to permit the Authority to render a negotiability decision . . ." The Authority will not consider a negotiability determination unless the union has submitted a proposal to management and the Authority.

Federal Labor Relations-Scope Of Bargaining. Management Must Negotiate Proposals Concerning Facilities For Day Care Centers. *American Federation Of Government Employees And Air Force Logistics Command, Wright-Patterson Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio,* 2 FLRA 77 (1980).

The union presented a proposal which addressed the providing of day care facilities for bargaining unit employees. Management refused to negotiate the proposal asserting that it is not a condition of employment affecting bargaining unit employees and, secondly, that it violates the agency's right to determine its budget under section 7106(a) of the Civil Service Reform Act of 1978. The Authority determined the proposal must be negotiated. It is a condition of employment because it affects the work situation and employment relationship. Provisions for child care arrangements make a job more attractive and, as such, aids in recruiting and keeping a stable workforce. It decreases employee tardiness and absenteeism associated with the need to provide for child care and it improves morale.

The proposal does not infringe upon management's right to determine its budget. An "agency's authority to determine its budget extends to the determination of the programs and operations which will be included in the estimate of proposed expenditures, and the determination of the amounts required to fund them." Thus, a union proposal may not prescribe particular programs or operations or the amount of funds to be allocated with them.

The fact that it merely increases the cost of the operations does not, of itself, render the proposal non-negotiable. A number of factors must be considered to determine its negotiability. Improved employee performance, increased productivity, reduced turnover and fewer grievances, amongst other matters, must be weighed against the increased cost. Only if the increase in costs is significant and unavoidable and is not offset by other compensating factors may management refuse to negotiate a proposal for budgetary reasons.

Federal Labor Relations-General-The Federal Labor Relations Authority Will Issue A Policy Determination Only When The Request For One Satisfies The Standards Set Forth In The Authority's Rules. ***Decision on Request for General Statement of Policy or Guidance,*** **2 FLRA 80 (1980).**

The National Treasury Employees Union requested the Authority to issue a major policy determination concerning the effect of certain provisions of the Civil Service Reform Act of 1978 on allegedly inconsistent provisions of its collective bargaining agreements. The inconsistent provisions of the collective bargaining agreements concerned the representational rights accorded exclusive representatives, the requirement for binding arbitration, the rights of employees to participate in the establishment of performance standards, and the prohibition of an agency to enforce a rule or regulation which was inconsistent with a collective bargaining agreement and was promulgated after the agreement was in effect. The Authority's rules at section 2427.7, state that the Authority shall, before rendering a policy statement, consider:

1. Whether the question presented can more appropriately be resolved by no other means;
2. Where other means are available, whether an Authority statement would prevent proliferation of cases involving the same or similar questions;
3. Whether the resolution of the question presented would have general applicability to the overall program.

The Authority determined the issuance of a policy statement was not warranted since the question could be more appropriately resolved by other means, such as unfair labor practice procedures. It would not prevent the proliferation of other cases because similar questions could arise with respect to almost all existing collective bargaining agreements throughout the federal sector. Resolution of the questions would not have general applicability to the overall program but, instead, would address only these collective bargaining agreements. Finally, the Authority felt that consideration of these questions would encourage others to submit similar questions concerning their unique collective bargaining agreements, the resolution of which would have little applicability to federal labor relations as a whole.

Consumer Law-Bankruptcy-"Fresh Start" Rights. A Person Who Has An Automobile Judgement Discharged In Bankruptcy Cannot Later Be Denied A Driver's License Under A State Statute Which Suspends The Licenses Of Those With Unsatisfied Judgements. ***Henry v. Herjison*** **(U.S.D.C., E.D. of Pa., 1-11-80) No. 78-1536.**

Plaintiff had her debts discharged in bankruptcy proceedings. Later, she was denied renewal of her driver's license pursuant to the Pennsylvania Financial Responsibility Law. Under this statute, the licenses of those with unsatisfied motor vehicle accident judgements are suspended until they provide proof of future financial responsibility by purchasing a special type of insurance.

Relying on the Supreme Court's decision in *Perez v. Campbell,* 402 U.S. 637 (1971), the district court found the Pennsylvania statute constitutionally invalid as violative of the Supremacy Clause. By requiring that drivers with default judgements purchase special insurance before being permitted to drive, the state statute conflicts with the Federal Bankruptcy Code which gives "discharged debtors a new start unhampered by the pressure and discouragement of pre-existing debt".

Section 525 of the Bankruptcy Code expressly prohibits discrimination against persons on the basis of debts which have been discharged in bankruptcy. The court held that "by establishing an eligibility requirement not required of the general public for operating privileges, based solely on a debt which has been discharged, defendants directly contravene the statutory language of 11 U.S.C. § 525.

In an accompanying order, the court enjoined enforcement of those sections of the Pennsyl-

vania Financial Responsibility Law which require plaintiff or members of her class to provide proof of financial responsibility in order to regain operating privileges.

Reserve Affairs Items

Reserve Affairs Department, TJAGSA

1. Mobilization Designee Vacancies

A number of installations have recently had new mobilization designee positions approved and applications may be made for these and other vacancies which now exist. Interested JA Reservists should submit Application for Mobilization Designation Assignment (DA Form 2976) to The Judge Advocate General's School, ATTN: Colonel William L. Carew, Reserve Affairs Department, Charlottesville, Virginia 22901.

Current position available are as follows:

GRD	*PARA*	*LINE*	*SEQ*	*POSITION*	*AGENCY*	*CITY*
MAJ	01A	01A	01	Dep Ch Atty (Proc Background)	Def Supply Svc	Washington, D.C.
MAJ	01N	01A	02	Judge Advocate	Fitzsimons AMC	Aurora, CO
LTC	06	04	09	Mil Judge	USALSA	Falls Church, VA
CPT	07	06	02	Judge Advocate	USALSA	Falls Church, VA
CPT	08	07	01	Judge Advocate	USALSA	Falls Church, VA
CPT	09	08	02	Judge Advocate	USALSA	Falls Church, VA
LTC	09C	03	01	Intl Affairs	OTJAG	Washington, DC
MAJ	10D	03	01	Admin Law	OTJAG	Washington, DC
LTC	11A	04	01	JA Opinions Br	OTJAG	Washington, DC
MAJ	15	03	02	JA Leg Asst Of	OTJAG	Washington, DC
LTC	14	02	01	Admin Law	OTJAG	Washington, DC
LTC	05A	02	01	Dep Chief	USA Clms Svc	Ft Meade, MD
MAJ	09	01A	01	JA	USA Dep Newcumberland	Newcumberland, PA
MAJ	78B	02	01	CmdJa	USA Depot	Corpus Christi, TX
MAJ	07	02	01	Judge Advocate	USAR Sch Tech Lab	Moffet Field, CA
CPT	08C	01A	02	Trial Counsel	172d Inf Bde	Ft Richardson, AK
CPT	08C	02A	01	Defense Counsel	172d Inf Bde	Ft Richardson, AK
CPT	08C	02A	02	Defense Counsel	172d Inf Bde	Ft Richardson, AK
MAJ	10A	02	01	Asst SJA	Sixth US Army	Presidio SF, CA
CPT	03B	01B	01	Trial Counsel	USA Garrison	Ft Devens, MA
CPT	03B	01B	03	Trial Counsel	USA Garrison	Ft Devens, MA
CPT	03C	01A	03	Defense Counsel	USA Garrison	Ft Devens, MA
MAJ	05A	03	01	Contract Law Off	USA Garrison	Ft Bragg, NC
MAJ	05A	04	01	JA	USA Garrison	Ft Bragg, NC
LTC	05B	01	01	Ch, Mil Justice	USA Garrison	Ft Bragg, NC
MAJ	05B	03	01	Trial Counsel	USA Garrison	Ft Bragg, NC
CPT	05B	04	01	Asst JA	USA Garrison	Ft Bragg, NC
CPT	05B	05	01	Asst JA	USA Garrison	Ft Bragg, NC
CPT	05B	07	01	Defense Counsel	USA Garrison	Ft. Bragg, NC
CPT	05B	08	01	Trial Counsel	USA Garrison	Ft Bragg, NC
MAJ	05C	02	01	JA	USA Garrison	Ft Bragg, NC
MAJ	05D	01	01	Claims Off	USA Garrison	Ft Bragg, NC
CPT	03A	02	04	Trial Counsel	101st Abn Div	Ft Campbell, KY

GRD	*PARA*	*LINE*	*SEQ*	*POSITION*	*AGENCY*	*CITY*
MAJ	03B	01	01	Ch, Def Counsel	101st Abn Div	Ft Campbell, KY
CPT	03B	02	04	Def Counsel	101st Abn Div	Ft Campbell, KY
CPT	03D	06	02	Asst SJA-DC	USA Garrison	Ft Stewart, GA
MAJ	03E	01	01	Asst SJA	USA Garrison	Ft Stewart, GA
LTC	03	02	01	Dep SJ	USA Garrison	Ft Hood, TX
LTC	03C	01	01	Def Counsel	USA Garrison	Ft Hood, TX
MAJ	03D	02	02	Asst JA	USA Garrison	Ft Hood, TX
MAJ	03E	01	01	Ch, Legal Asst Off	USA Garrison	Ft Hood, TX
CPT	03E	03	01	Legal Asst Off	USA Garrison	Ft Hood, TX
CPT	03E	03	02	Legal Asst Off	USA Garrison	Ft Hood, TX
CPT	03F	03	01	Asst Clms Off	USA Garrison	Ft Hood, TX
CPT	03B	03	01	Def Counsel	5th Inf Div	Ft Polk, LA
CPT	03B	03	02	Def Counsel	5th Inf Div	Ft Polk, LA
CPT	03B	03	03	Def Counsel	5th Inf Div	Ft Polk, LA
CPT	03B	03	04	Def Counsel	5th Inf Div	Ft Polk, LA
CPT	03B	04	02	Trial Counsel	5th Inf Div	Ft Polk, LA
MAJ	03C	01	01	Asst SJA	5th Inf Div	Ft Polk, LA
MAJ	03C	01	02	Asst SJA	5th Inf Div	Ft Polk, LA
MAJ	03C	01	01	Ch, Mil Justice	USA Garrison	Ft Sheridan, IL
MAJ	03C	01	02	Ch, Mil Justice	USA Garrison	Ft Sheridan, IL
MAJ	02A	02	01	Ch, Def Counsel	USA Garrison	Ft Riley, KS
MAJ	02B	03	01	Ch, Legal Asst	USA Garrison	Ft Riley, KS
CPT	02B	04	01	Asst JA	USA Garrison	Ft Riley, KS
CPT	02C	02	01	Asst JA	USA Garrison	Ft Riley, KS
CPT	03B	03	02	JA	Ft McCoy	Sparta, WI
CPT	03B	03	03	JA	Ft McCoy	Sparta, WI
CPT	03B	03	04	JA	Ft McCoy	Sparta, WI
CPT	03C	02	02	Mil Aff Leg Asst O	Ft McCoy	Sparta, WI
MAJ	66	02	01	JA	Ft McCoy	Sparta, WI
MAJ	03D	01	01	Ch, Admin Law Br	9th Inf Div	Ft Lewis, WA
CPT	21J	01	01	JA	9th Inf Div	Ft Lewis, WA
CPT	03B	02	01	JA	USA Garrison	Ft Buchanan, PR
MAJ	03D	01	01	Ch, JA	USA Garrison	Ft Buchanan, PR
CPT	03D	02	01	Judge Advocate	USA Garrison	Ft Buchanan, PR
CPT	03E	02	01	JA	USA Garrison	Ft Buchanan, PR
MAJ	05F	02	01	Mil Affrs Off	USA Armor Cen	Ft Knox, KY
MAJ	04A	03	01	Sr Def Counsel	USA Inf Cen	Ft Benning, GA
LTC	04B	02	01	Asst Ch MALAC	USA Inf Cen	Ft Benning, GA
CPT	04B	04	01	Admin Law Off	USA Inf Cen	Ft Benning, GA
CPT	04B	05	02	Admin Law Off	USA Inf Cen	Ft Benning, GA
CPT	04B	07	03	Legal Asst Off	USA Inf Cen	Ft Benning, GA
CPT	04B	08	01	Claims Off	USA Inf Cen	Ft Benning, GA
MAJ	09A	02	01	Asst SJA	USA Signal Cen	Ft Gordon, GA
CPT	07A	04	01	JA	Avn Center	Ft Rucker, AL
CPT	38A	03	02	Asst SJA	USA Garrison	Ft Chaffee, AR
CPT	38A	03	04	Asst SJA	USA Garrison	Ft Chaffee, AR
CPT	38A	03	05	Asst SJA	USA Garrison	Ft Chaffee, AR
CPT	38A	03	06	Asst SJA	USA Garrison	Ft Chaffee, AR

GRD	*PARA*	*LINE*	*SEQ*	*POSITION*	*AGENCY*	*CITY*
CPT	38A	03	07	Asst SJA	USA Garrison	Ft Chaffee, AR
MAJ	38B	02	01	Admin Law Off	USA Garrison	Ft Chaffee, AR
MAJ	38B	02	02	Admin Law Off	USA Garrison	Ft Chaffee, AR
CPT	38B	04	01	Asst SJA	USA Garrison	Ft Chaffee, AR
CPT	38B	04	02	Asst SJA	USA Garrison	Ft Chaffee, AR
CPT	38B	04	03	Asst SJA	USA Garrison	Ft Chaffee, AR
CPT	05A	04	02	Trial Counsel	USA FA Cen	Ft Sill, OK
CPT	05A	07	01	Defense Counsel	USA FA Cen	Ft Sill, OK
CPT	05A	07	02	Defense Counsel	USA FA Cen	Ft Sill, OK
CPT	05A	07	03	Defense Counsel	USA FA Cen	Ft Sill, OK
MAJ	05B	03	01	Admin Law Off	USA FA Cen	Ft Sill, OK
MAJ	05B	03	02	Admin Law Off	USA FA Cen	Ft Sill, OK
CPT	05B	05	01	Proc Fis Law Off	USA FA Cen	Ft Sill, OK
CPT	05B	07	01	Legal Asst Off	USA FA Cen	Ft Sill, OK
CPT	05B	07	02	Legal Asst Off	USA FA Cen	Ft Sill, OK
CPT	05B	07	03	Legal Asst Off	USA FA Cen	Ft Sill, OK
MAJ	28D	02	01	Proc/Fiscal Law O	USA AD Cen	Ft Bliss, TX
MAJ	05	01A	01	Dep SJA	USA Admin Cen	Ft B Harrison, IN
CPT	11D	06	01	Instr	USA Intel Cen	Ft Huachuca, AZ
CPT	11D	06	03	Instr	USA Intel Cen	FT Huachuca, AZ
MAJ	12	02	02	Asst JA	ARNG TSA Cp Atterbury	Edinburg, IN
CW4	02	03	01	Legal Admin Tech	1st Inf Div	Ft Riley, KS
CW4	03A	01	01	Legal Admin Tech	5th Inf Div	Ft Polk, LA
CW4	04	10	01	Legal Admin Tech	USA Garrison	Ft Sam Houston, TX
CW4	04	04	01	Legal Admin Tech	USA Garrison	Ft Bragg, NC
CW4	03	03	01	Legal Admin Tech	101st Abn Div	Ft Campbell, KY
CW4	38	03	01	Legal Admin Tech	USA Garrison	Ft Chaffee, AR
CW4	05	05A	01	Legal Admin Tech	USA Garrison	Ft B Harrison, IN

2. Reserve ID Cards

The Judge Advocate General's School does not issue Reserve Component ID cards. A Reserve officer who needs an ID card should follow the procedure outlined below:

1. Fill out DA Form 428 and forward it to Commander, U.S. Army Reserve Components Personnel and Administration Center, ATTN: AGUZ-PSE-VC, 9700 Page Boulevard, St. Louis Missouri 63132. Include a copy of recent AT orders or other documentation indicating that applicant is an actively participating Reservist.

2. RCPAC will verify the information and the individual's entitlement, prepare an ID card, and send it back to the Reservist.

3. The Reservist must sign it, affix fingerprints, attach an appropriate photograph, and return the materials to RCPAC.

4. RCPAC will affix the authorizing signature and laminate the card, and will send the finished card to the applicant. Also inclosed will be a form receipting for the ID card.

5. Applicant must execute the receipt form and send it to RCPAC.

3. Update News on JARCGSC

Effective 1 October 1980, applications for the Judge Advocate Reserve Components General Staff Course will be closed. Some applications received before 1 October 1980 *may* have to be returned disapproved because of space limitations. Applicants are reminded that normal enrollment criteria still apply and captains are not eligible for enrollment unless they are on a promotion list to major.

Effective 1 June 1981, applications for equivalent credit for JARCGSC will no longer be accepted. If you are seeking equivalent credit for JARCGSC based on courses completed thru Fort Leavenworth, send your request for equivalent credit along with complete justification to TJAGSA, ATTN: JAGS-RA (Personnel Actions), Charlottesville, VA 22901 as soon as possible.

For those students desiring to transfer from Fort Leavenworth CGSC to JARCGSC, applications must be received in the Reserve Affairs Department and approved prior to application for summer AT, due to quota limitations for the summer resident phase. Transfer students are also reminded that 125 credit hours are necessary for transfer to the resident phase of JARCGSC, and that all enrollment criteria apply to transfer applications.

Non-Judicial Punishment

Quarterly Court-Martial Rates Per 1000
Average Strength
April-June 1980

	Quarterly Rates
ARMY-WIDE	51.66
CONUS Army commands	56.14
OVERSEAS Army commands	44.61
USAREUR and Seventh Army commands	43.77
Eighth US Army	61.07
US Army Japan	9.72
Units in Hawaii	46.61
Units in Alaska	22.94
Units in Panama	44.34

Courts-Martial

Quarterly Court-Martial Rates Per 1000
Average Strength
April-June 1980

	General CM	Special CM		Summary CM
		BCD	Non-BCD	
ARMY-WIDE	.51	.56	1.04	1.25
CONUS Army commands	.34	.54	.99	1.41
OVERSEAS Army commands	.73	.60	1.12	.99
USAREUR and Seventh Army commands	.88	.67	.98	.77
Eighth US Army	.21	.72	1.81	1.93
US Army Japan	—	—	.75	—
Units in Hawaii	.33	.16	1.37	1.26
Units in Alaska	.58	—	.92	1.38
Units in Panama	.14	—	2.17	3.18

NOTE: Above figures represent geographical areas under the jurisdiction of the commands and are based on average number of personnel on duty within those areas.

JAGC Personnel Section

PP&TO, OTJAG

The following officers have been selected for promotion to Major, RA:

ALTIERI, Richard T.
ANDERSON, Larry D.
BAKER, James R.
BATES, Bernie L.
BEHUNIAK, Thomas E.
BELT, Julia
BUFKIN, Henry P.

BURGER, James A.
CHWALIBOG, Andrew J.
CLARK, Elliot J.
DAVIDSON, Van M.
FINKLEA, Alfred M.
GRAVELLE, James F.
GRAVES, Joseph L.
HAMILTON, John R.
JACOBSEN, Craig C.
KAPLAN, Marshall M.
KESLER, Dickson E.
KIRBY, Robert B.
LANCASTER, Steven F.
LANE, Thomas C.
LANTZ, William H.
LEONARDI, Kenneth J.
MACKEY, Richard J.
MANNING, Jay P.
McLAURIN, John P.
MILLARD, Arthur F.
PARK, Percival D.
RIVEST, Joseph R.
SEIBOLD, Paul M.
TAYLOR, Thomas W.
TROMEY, Thomas N.
VALLECILLO, Carlos
WENTINK, Michael J.
YUDESIS, Benjamin

The selection rate for Army Promotion List Officers considered was 81.7%.

The percentage of the Judge Advocate officers considered and selected was 94.7%.

A Matter of Record

Notes from Government Appellate Division, USALSA

1. Crimes (Fraternalization):

When fraternization is charged under Article 134, UCMJ, trial counsel must insure that the record fully reflects that the conduct was either prejudicial to the good order and discipline of the armed forces or of a nature likely to bring discredit upon the armed forces. A captain in a recent case was charged under Articles 133 and 134, UCMJ, of fraternizing with two female soldiers. The record fully demonstrates that the acts of sexual intercourse took place. Trial counsel relied on inferences of the prejudicial nature of the conduct, but he never specifically addressed the issue. The allied papers indicate that the parties were all assigned to the same company and that the source of conduct was widely known within another battalion on post. This evidence would certainly help sustain the Government's burden as to this particular element. Whenever an Article 134 offense is charged, one of the elements that the Government must prove is either that the conduct was prejudicial to good order and discipline of the service or that it was of a nature to bring discredit upon the service. It is as necessary to prove this element as every other element of the charge.

2. Pretrial Agreement:

Government counsel must be cautious in negotiating sentence limitations so that the language accurately reflects the intent of the parties. In a recent case, the agreement provided that the convening authority would, *inter alia:*

> suspend for a period of 13 months from the time [he] [took] action forfeitures of pay and allowances in the amount of $175.00 a month.

The intent of the parties was to suspend *any amount in excess* of $175.00 pay per month. The appellate court construed the language to require that $175.00 of whatever forfeitures were adjudged be suspended. In an earlier case, the convening authority agreed:

> [t]o suspend for the period of confinement plus one year, that portion of the adjudged sentence which provides for confinement at hard labor for a period in excess of 5 years, total forfeitures of pay and allowances in excess of 5 years, reduction to the grade of Private E-1, and dishonorable discharge.

The convening authority intended to suspend only the confinement portion of the sentence. The appellate court read the terms of the agreement to require suspension of the discharge, the reduction, and the forfeitures as well. Obviously, clarity and attention to detail are critical in this area.

3. Review and Action:

Reviewing authorities must also be careful to draft the convening authority's action so that it accurately states the action intended. A recent accused received a sentence to a bad conduct discharge, confinement at hard labor for one year, forfeiture of $300.00 pay per month for nine months, and reduction to the grade of E-1. The staff judge advocate advised the convening authority that the pretrial agreement required the convening authority to suspend any confinement in excess of nine months and forfeitures in excess of $200.00 per month for nine months. The action in the case, however, provided for suspension of "those portions of the sentence in excess of confinement at hard labor for nine months, forfeitures of $200.00 pay per month for nine months and reduction to Private E-1." Because of the failure to include the bad conduct discharge within this quoted language the action inadvertedly suspended the BCD. In another case, the staff judge advocate advised the convening authority that he was required by the agreement to suspend forfeitures in excess of $273.00 for a period of 13 months. Unfortunately, the action omitted the words "in excess," resulting in an action which suspended $273.00 of the *forfeitures* adjudged. Consequently, the court suspended forfeitures in excess of *$27.00* pay per month. Plainly, the language here is also crucial to the outcome of the criminal procedure and great care must be exercised to insure that it provides for the intended result.

4. Regulation and Orders:

Trial counsel should be aware of the Freedom of Information Act (FOIA), 5 U.S.C. § 552 *et seq.*, and the effect of its publication requirements upon the enforceability of local regulations. An accused was recently charged with an aggravated assault and with violation of a local post regulation by possessing a knife with a blade in excess of 3 inches. The accused challenged the enforceability of the regulation as it had not been published in the Federal Register in accordance with FOIA. The trial counsel conceded the issue, and trial proceeded on the assault charge alone. Trial counsel was incorrect in conceding the issue. While failure to publish the regulation may prevent its enforcement against civilians, the regulation is still enforceable against service personnel. The Act exempts any regulation governing internal personnel rules from the publication requirement (5 U.S.C. § 552(b)(2)). Thus, as far as enforcement within the agency (DOD) is concerned, FOIA does not require prior publication of the regulation in the Federal Register. *See United States v. Hayes*, 325 F.2d 307 (4th Cir. 1963). Trial counsel should be aware of the publication requirements of FOIA and should be particularly aware of the intra-agency exceptions contained within the Act.

Judiciary Notes

US Army Legal Services Agency

Digests—Article 69, UCMJ, Applications

In *Martin*, SPCM 1980/4691, relief was granted because the accused's commander impermissibly relied on the judgment of a CID agent as to the reliability of the informant in authorizing a search of the accused's off-post apartment in Korea. No evidence was presented to the military judge on the motion to suppress that would have justified a search of the accused's apartment without a warrant.

The incident in question arose out of a search of the accused's apartment on 2 May 1979 by the CID; 17 envelopes of marihuana, weighing about 458 grams, were found in a box under the

bed in the accused's bedroom. This search was authorized by CPT T, the accused's commander, on 2 May 1979, on the basis of information supplied by SP4 M to CID Agent G. While Agent G told CPT T the name of the informant, CPT T never interviewed SP4 M, nor had he had any piror contact with or knowledge of SP4 M. SP4 M had never provided information to either the CID or CPT T before.

The crucial issue as to probable cause was the reliability of the informant. SP4 M had been apprehended on 24 April 1979 by the Korean police for possession of 165 grams of marihuana in his off-post apartment. Following his apprehension, SP4 M had admitted possession of the marihuana and named the accused as his supplier.

On the motion to suppress, CPT T testified that he had no particular reason to believe SP4 M; the only things he really knew about SP4 M was what Agent G told him, and that SP4 M had been arrested for possession of marihuana and confessed. He further testified, "I would say that, because Mr. [G] thought that [M] was reliable, I thought that he must be reliable."

Acting in the role of a neutral and detached magistrate, CPT T was required to make an independent determination of SP4 M's credibility. This he did not do; he relied impermissibly on Agent G's judgment. *See United States v. Houston*, 23 C.M.A. 201, 48 C.M.R. 953 (1974). The failure of CPT T to make an adequate independent determination of SP4 M's credibility invalidated the warrant and subsequent search. Since the accused was convicted only of possessing the marihuana discovered in the illegal search of his quarters, relief was granted.

In *Duquette*, SPCM 1980/4733, the accused was charged with violating US Army Support Command Hawaii Regulation 600-4 by wrongfully possessing a "roach clip" in volation of Article 92, UCMJ, and with wrongful possession of marihuana in violation of Article 134, UCMJ. SGT T was driving the accused and three other soldiers in a military van from the NCO Academy to another military installation on Hawaii. SGT T asked the accused for a cigarette. As the accused extracted a cigarette from the pack, SGT glanced in the rear-view mirror and saw a hand-rolled cigarette that he believed to marihuana. SGT T pulled the van into a service station and ordered all the occupants out. He then asked the accused for the cigarette pack in his pocket. When the accused removed the pack, SGT T ordered him to empty the contents on the ground. The accused did so, and SGT T seized a marihuana cigarette.

Among his grounds for relief, the accused contended that the court-martial lacked subject-matter jurisdiction; that the evidence of the marihuana cigarette should have been suppressed, and that the military judge failed to instruct the court members on the criteria for a valid apprehension. Relief was denied on all grounds.

There were enough *Relford v. Commandant*, 401 U.S. 355 (1971), criteria present in this case to clothe the court with jurisdiction. The accused was in uniform, on duty, and in a military vehicle. The offense occurred in a military vehicle while the accused was engaged in a military duty. There was a violation of military property and a flouting of military authority. There was service connection albeit the ultimate offense occurred off post. *See United States v. Strangstalien*, 7 M.J. 225 (C.M.A. 1979); *U.S. v. Carr*, 7 M.J. 339 (C.M.A. 1979).

The marihuana was offered at trial on the theory that it was seized incident to a lawful apprehension. There was no issue of probable cause or SGT T's authority to apprehend. SGT T did not tell the accused that he was apprehended. The question was whether SGT T's words and actions consituted an apprehension within the meaning of paragraph 19*c*, MCM 1969 (Rev.). The evidence supported the judge's finding that the totality of facts reasonably indicated that both the accused and SGT T were aware that the accused's personal liberty had been restrained. That constituted an apprehension, even in the absence of verbalization. *United States v. Noble*, 2 M.J. 672 (A.F.C.M.R. 1976), *pet. denied*, 2 M.J. 187 (C.M.A. 1976); *United States v. Hardy*, 3 M.J.

713 (A.F.C.M.R.), *pet. denied,* 3 M.J. 470 (C.M.A. 1977).

Whether or not there had been a valid apprehension was pertinent only to the question of the admissibility of evidence, not to the ultimate issue of guilt or innocence. Thus, it was an interlocutory question. Paragraph 57*b*, MCM 1969 (Rev.). The military judge's ruling on an interlocutory question is final, and the issue need not thereafter be submitted to court members. *Id.* at paragraph 57*a; United States v. Plaut,* 18 C.M.A. 265, 39 C.M.R. 265 (1969).

Harris, SPCM 1980/4752, involved two issues. First, a search involving Rolfe, a drug detection dog. While walking through the common areas of a barracks with his handler and a drug suppression team, Rolfe alerted at several rooms, including the accused's. The information was passed on to the subinstallation commander who, knowing Rolfe and being familiar with his track record, authorized a search. The accused objected to the admissibility of marihuana discovered in the wall locker in his room.

Use of a drug detection dog in common areas of the barracks did not violate any reasonable expectation of privacy of the accused. The dog and search team were where they had a right to be without any need for antecedent probable cause to justify their presence. *See United States v. Hessler,* 7 M.J. 9 (C.M.A. 1979); *United States v. Samora,* 6 M.J. 360 (C.M.A. 1979). As Rolfe had an established track record which was known to the person who authorized the search, the alert provided sufficient probable cause to believe that marihuana was in the accused's room. *See United States v. Grosskreutz,* 5 M.J. 344 (C.M.A. 1978).

The accused and his roommate, PFC C, shared the wall locker in which the marihuana was discovered. At PFC C's trial, another military judge granted the defense motion to suppress the marihuana. The accused contended that the ruling at PFC C's trial should be binding at his trial.

The principle of collateral estoppel is known in military law as part of the doctrine of *res judicata. United States v. Marks,* 21 C.M.A. 281, 45 C.M.R. 55 (1972); *Cosby,* JALS-ED SPCM 1978/4306, and cases cited therein. The doctrine of *res judicata* provides that a matter put in issue and finally determined by a court of competent jurisdiction cannot be disputed between the same parties in a subsequent trial. Paragraph 71*b*, MCM 1969 (Rev.). This principle is equally applicable to the doctrine of collateral estoppel. *See,* e.g., *People v. Legrand,* 389 N.Y.S. 2d 531 (New York County Ct. 1976). As the accused was not a party in PFC C's trial, the doctrine did not apply to this case. Relief was denied.

Supervisory Review Under Article 65(c), UCMJ

Examination of applications for relief under Article 69, UCMJ, indicates that the importance of the review of records of trial, pursuant to Article 65(c), UCMJ, is not appreciated by some judge advocates. For all practical purposes, the Article 65(c) review is the final review for records of trial by summary court-martial, and by special court-martial which did not result in an approved bad-conduct discharge. According to paragraph 94*a*(2), MCM 1969 (Rev.), the determination by the supervisory reviewing authority that the findings and sentence are correct in law and fact finalizes the proceeedings within the meaning of Article 76, UCMJ. Thereafter, the convening authority may not withdraw his action nor may the officer having supervisory authority under Article 65(c), take correction action *sua sponte.* Except for a request to The Judge Advocate General for extraordinary relief, there is no further review of records of trial by inferior courts-martial.

To protect fully the interests of both the accused and the Government, the judge advocate performing the supervisory review must meticulously examine the record of trial and its allied papers and insure that the proceedings, findings, and sentence as approved by the convening authority are legally correct in all respects.

Kansas State Bar

Lieutenant Colonel Floyd E. Gehrt, USAR

Any officers who have been admitted to practice law in the State of Kansas should be aware of some recent changes relative to active or inactive status. All attorneys actively practicing in Kansas are required to register and pay a registration fee. For those lawyers who are not actively engaged in practice, registration is made with the request that they be listed on an inactive status with their current address. There is no charge for an attorney who wishes to be on an inactive status.

Each year a statement is mailed to all registered attorneys indicating the fee that will be charged for that year and when the fee is due. If a person is on inactive status and wishes to remain so, all he or she has to do is to return the statement indicating any change of address with a note indicating they wish to remain on inactive status. Upon receipt of this statement, a new inactive status card will be issued with no fee being charged. This may continue for any number of years and so long as the attorney will notify the clerk's office of any change of address or status each year, they will remain in good standing. If after a number of years, an attorney wishes to become active, he or she simply notifies the clerk's office of this fact and pays the fee for that particular year only. Upon receipt of the fee an active status card will be issued.

All officers who have been admitted to practice in Kansas and would like to maintain a current standing are urged to make the registration as set forth above. In addition, the officer registering will be on the mailing list and will be kept abreast of any further developments as pertains to the practice of law in the State of Kansas. Requests for registration should be made to Clerk, Appellate Courts, Kansas Judicial Center, Topeka, Kansas, 66612.

CLE News

1. TJAGSA CLE Courses

October 14-17: World Wide Jag Conference.

October 20-December 19: 94th Basic Course (5-27-C20).

November 4-7: 12th Fiscal Law (5F-F12).

November 17-21: 57th Senior Officer Legal Orientation (5F-F1).

November 17-21: 15th Law of War Workshop (5F-F42).

December 4-6: USAR JAGC Conference.

December 8-12: 8th Advanced Administrative Law (5F-F25).

December 8-19: 86th Contract Attorneys Course (5F-F10).

December 15-17: 5th Government Information Practices (5F-F28).

January 5-9: 16th Law of War Workshop (5F-F42).

January 5-9: 11th Contract Attorneys Advanced (5F-F11).

January 12-16: 2nd Negotiations, Changes, and Terminations (5F-F14).

January 19-23: 8th Legal Assistance (5F-F23).

January 26-30: 58th Senior Officer Legal Orientation (5F-F1).

February 2-5: 10th Environmental Law (5F-F27).

February 2-Apr 3: 95th Basic Course (5-27-C20).

February 9-13: 9th Defense Trial Advocacy (5F-F34).

February 18–20: 3d CITA Workshop (TBD).

February 23–27: 2nd Prosecution Trial Advocacy (5F–F32).

March 2–6: 20th Federal Labor Relations (5F–F22).

March 9–20: 87th Contract Attorneys (5F–F10).

April 6–10: 59th Senior Officer Legal Orientation (5F–F1).

April 13–14: 3d U.S. Magistrate Workshop (5F–F53).

April 28–May 1: 11th Staff Judge Advocate Orientation (5F–F52).

May 4–8: 60th Senior Officer Legal Orientation (Army War College) (5F–F1).

May 4–8: 3d Military Lawyer's Assistant (512–71D20/50).

May 11–15: 1st Administrative Law for Military Installations (TBD).

May 18–June 5: 22nd Military Judge (5F–F33).

June 1–12: 88th Contract Attorneys (5F–F10).

June 8–12: 61st Senior Officer Legal Orientation (5F–F1).

June 15–26: JAGSO Reserve Training.

July 6–17: JAGC RC CGSC

July 6–17: JAGC BOAC (Phase IV).

July 20–31: 89th Contract Attorneys (5F–F10).

July 20–August 7: 23d Military Judge Course (5F–F33).

August 3–October 2: 96th Basic Course (5–27–C20).

August 10–14: 62nd Senior Officer Legal Orientation (5F–F1).

August 17–May 22, 1982: 30th Graduate Course (5–27–C22).

August 24–26: 5th Criminal Law New Developments (5F–F35).

September 8–11: 13th Fiscal Law (5F–F12).

September 21–25: 17th Law of War Workshop (5F–F42).

September 28–October 2: 63d Senior Officer Legal Orientation (5F–F1).

2. Civilian Sponsored CLE Courses

For further information on civilian courses, please contact the institution offering the course, as listed below:

AAA: American Arbitration Association, 140 West 51st Street, New York, NY 10020.

AAJE: American Academy of Judicial Education, Suite 437, 1426 H Street NW, Washington, DC 20005. Phone: (202) 783-5151.

ABA: American Bar Association, 1155 E. 60th Street, Chicago, IL 60637.

ALI-ABA: Donald M. Maclay, Director, Office of Courses of Study, ALI-ABA Committee on Continuing Professional Education, 4025 Chestnut St., Philadelphia, PA 19104. Phone: (215) 243-1630.

ARKCLE: Arkansas Institute for Continuing Legal Education, 400 West Markham, Little Rock, AR 72201.

ATLA: The Association of Trial Lawyers of America, Education Department, P.O. Box 3717, 1050 31st St. NW Washington, DC 20007. Phone: (202) 965-3500.

BCGI: Brandon Consulting Group, Inc., 1775 Broadway, New York, NY 10019.

BNA: The Bureau of National Affairs Inc., 1231 25th Street, N.W., Washington, DC 20037.

CCEB: Continuing Education of the Bar, University of California Extension, 2150 Shattuck Avenue, Berkeley, CA 94704.

CCH: Commerce Clearing House, Inc., 4025 W. Peterson Avenue, Chicago, IL 60646.

CCLE: Continuing Legal Education in Colorado, Inc., University of Denver Law Center, 200 W. 14th Avenue, Denver, CO 80204.

CLEW: Continuing Legal Education for Wisconsin, 905 University Avenue, Suite 309, Madison, WI 53706.

DLS: Delaware Law School, Widener College, P.O. Box 7474, Concord Pike, Wilmington, DC 19803.

FBA (FBA-BNA): Conference Secretary, Federal Bar Association, Suite 420, 1815 H Street NW, Washington, DC 20006. Phone: (202) 638-0252.

FLB: The Florida Bar, Tallahassee, FL 32304.

FPI: Federal Publications, Inc., Seminar Division Office, Suite 500, 1725 K Street NW, Washington, DC 20006. Phone: (202) 337-7000.

GCP: Government Contracts Program, George Washington University Law Center, Washington, DC.

GICLE: The Institute of Continuing Legal Education in Georgia, University of Georgia School of Law, Athens, GA 30602.

GWU: Government Contracts Program, George Washington University, 2000 H Street NW, Rm. 303 D2, Washington DC 20052. Phone: (202) 676-6815.

ICLEF: Indiana Continuing Legal Education Forum, Suite 202, 230 East Ohio Street, Indianapolis, IN 46204.

ICM: Institute for Court Management, Suite 210, 1624 Market St., Denver, CO 80202. Phone: (303) 543-3063.

IPT: Institute for Paralegal Training, 235 South 17th Street, Philadelphia, PA 19103.

KCLE: University of Kentucky, College of Law, Office of Continuing Legal Education, Lexington, KY 40506.

MCLNEL: Massachusetts Continuing Legal Education—New England Law Institute, Inc., 133 Federal Street, Boston, MA 02108, and 1387 Main Street, Springfield, MA 01103.

MOB: The Missouri Bar Center, 326 Monroe, P.O. Box 119, Jefferson P.O. Box 767, Raleigh, NC 27602.

NCAJ: National Center for Administration of Justice, 1776 Massachusetts Ave., NW, Washington, DC 20036. Phone: (202) 466-3920.

NCATL: North Carolina Academy of Trial Lawyers, Education Foundation Inc., P.O. Box 767, Raleigh NC. 27602.

NCCDL: National College of Criminal Defense Lawyers and Public Defenders, Bates College of Law, University of Houston, Houston, TX 77004.

NCDA: National College of District Attorneys, College of Law, University of Houston, Houston, TX 77004. Phone: (713) 749-1571.

NCJJ: National Council of Juvenile and Family, Court Judges, University of Nevada, P.O. Box 8978, Reno, NV 89507.

NCLE: Nebraska Continuing Legal Education, Inc., 1019 Sharpe Building, Lincoln, NB 68508.

NDAA: National District Attorneys Association, 666 North Lake Shore Drive, Suite 1432, Chicago, IL 60611.

NDCLE: North Dakota Continuing Legal Education.

NITA: National Institute for Trial Advocacy, University of Minnesota Law School, Minneapolis, NN 55455.

NJC: National Judicial College, Judicial College Building, University of Nevada, Reno, NV 89507.

NPI: National Practice Institute, 861 West Butler Square, Minneapolis, MN 55403. Phone: 1-800-328-4444 (In MN call (612) 338-1977).

NYSBA: New York State Bar Association, One Elk Street, Albany, NY 12207.

NYSTLA: New York State Trial Lawyers Association, Inc., 132 Nassau Street, New York, NY 12207.

NYULT: New York University, School of Continuing Education, Continuing Education in Law and Taxation, 11 West 42nd Street, New York, NY 10036.

OLCI: Ohio Legal Center Institute, 33 West 11th Avenue, Columbus, OH 43201.

PATLA: Pennsylvania Trial Lawyers Association, 1405 Locust Street, Philadelphia, PA 19102.

PBI: Pennsylvania Bar Institute, P.O. Box 1027, 104 South Street, Harrisburg, PA 17108.

PLI: Practising Law Institute, 810 Seventh Avenue, New York, NY 10019. Phone: (212) 765-5700.

SBM: State Bar of Montana, 2030 Eleventh Avenue, P.O. Box 4669, Helena, MT 59601.

SBT: State Bar of Texas, Professional Development Program, P.O. Box 12487, Austin, TX 78711.

SCB: South Carolina Bar, Continuing Legal Education, P.O. Box 11039, Columbia, SC 29211.

SLF: The Southwestern Legal Foundation, P.O. Box 707, Richardson, TX 75080.

SNFRAN: University of San Francisco, School of Law, Fulton at Parker Avenues, San Francisco, CA 94117.

TBI: The Bankruptcy Institute, P.O. Box 1601, Grand Central Station, New York, NY 10017.

UDCL: University of Denver College of Law, 200 West 14th Avenue, Denver, CO 80204.

UHCL: University of Houston, College of Law, Central Campus, Houston, TX 77004.

UMLC: Univeristy of Miami Law Center, P.O. Box 248087, Coral Gables, FL 33124.

UTCLE: Utah State Bar, Continuing Legal Education, 425 East First South, Salt Lake City, UT 84111.

VACLE: Joint Committee of Continuing Legal Education of the Virginia State Bar and The Virginia Bar Association, School of Law, University of Virginia, Charlottesville, VA 22901.

VUSL: Villanova University, School of Law, Villanova, PA 19085.

December

1-3: FPI, Cost Estimating for Government Contracts, Washington, DC.

1-4: FPI, Fundamentals of Government Contracting, Washington, DC.

1-3: FPI, Inspection, Acceptance, & Warranties, Lake Tahoe, NV.

4-5: PLI, Drafting Documents in Plain Language, San Francisco, CA.

4: VACLE, Estate Planning & Administration, Roanoke, VA.

4-5: PLI, Immigration & Naturalization Institute, San Francisco, CA.

5: VACLE, Estate Planning & Administration, Richmond, VA.

7-12: NJC, Administrative Law Procedure, Reno, NV.

7-19: NJC, Decision Making: Process Skills & Techniques, Reno, NV.

8-10: FPI, Government Contracting Costs, Williamsburg, VA.

8-12: FPI, The Masters Institute in Government Contracting, Williamsburg, VA.

11: VACLE, Estate Planning & Administration, Tysons Corner, VA.

11-12: GICLE, Southeastern Labor Relations Institute, Atlanta, GA.

12: VACLE, Estate Planning & Administration, Norfolk, VA.

12-13: KCLE, Handling Accident Cases, Lexington, KY.

14-19: NJC, Evidence, Reno, NV.

15-17: FPI, Contracting for Services, Washington, DC.

15-17: FPI, Cost Estimating for Government Contracts, Las Vegas, NV.

3. Military Rules of Evidence

The worldwide Military Rules of Evidence presentations conducted by Major Fredric Lederer, JAGC, U.S. Army, and Commander James Pinnell, JAGC, U.S. Navy, have been accredited for CLE purposes by the mandatory CLE jurisdictions. Judge advocates desiring credit should notify their respective states in accordance with the applicable CLE rules of their jurisdiction. Commander Mike Hannis, JAGC, U.S. Navy, who secured the CLE accreditation, has kindly consented to provide a sponsor's report to the mandatory CLE jurisdictions for Army members. Judge advocates desiring such credit should immediately notify Commander Hannis, Office of The Judge Advocate General, Code 63, Department of the Navy, 200 Stoval Street, Alexandria, Virginia 22332. The notification should include the dates and location of the presentation which you attended. Judge advocates desiring credit for "specialization" purposes (i.e., certification or designation) should make their own arrangements for that credit, as no separate arrangements have been made with the specialization jurisdictions.

Current Materials of Interest

1. Book Review

Finkelstein, Zane E., COL, JAGC, Director of International Law Studies, U.S. Army War College, Carlisle Barracks, Pa. *The Brethren at Law and at War: An Essay,* 10 Parameters 79 (June 1980). Review of *The Brethren: Inside the Supreme Court,* by Robert Woodward and Scott Armstrong (New York: Simon & Schuster, (1979).

2. Current Messages and Regulations

The following lists of recent messages and changes to selected regulations is furnished for your imformation in keeping your reference materials up to date. All offices may not have a need for and may not have been on distribution for some of the messages and/or regulations listed.

a. Messages

DTG	*SUBJECT*	*PROPONENT*
091300Z Jul 80	Delayed Receipt of Court-Martial Orders at USDB and VSARB	DAJA-CL
111200Z Jul 80	Military Rules of Evidence	DAJA-CL
141200Z Jul 80	United States v. Edwards 9 M.J. 94 (C.M.A. 1980)	DAJA-CL
182029Z Jul 80	AR 601-100 Appointment of Commissioned and Warrant Officers in the Regular Army	DAPE-MPO
221329Z Jul 80	Nonreceipt of DA Form 3836, Notice of Return of US Army Member from Unauthorized Absence	DAPE-HRE-EM

b. Regulation

NUMBER	*TITLE*	*DATE*
AR 190-28	Military Police Use of Force by Personnel Engaged in Law Enforcement and Security Duties	1 August 1980

3. Professional Writing Award for 1979

Each year, the Alumni Association of The Judge Advocate General's School gives an award to the author of the best article published in the Military Law Review during the previous year. The award consists of a written citation signed by The Judge Advocate General and an engraved plaque. The history of and criteria for the award are set forth at 87 Mil. L. Rev. 1 (winter 1980).

Major Riggs L. Wilks and Major Gary L. Hopkins have been selected to receive the award for 1979. The award is given for their article, "Use of Specifications in Federal Contracts: Is the Cure Worse than the Disease?" published at 86 Mil. L. Rev. 47 (fall 1979).

4. Distribution of JAG School Publications

During the month of September the 1980-81 Annual Bulletin of The Judge Advocate General's School will be distributed. Three copies of the Bulletin will be mailed to each active duty staff judge advocate and one to each post judge advocate.

A few branch offices of the US Army Trial Defense Service have noted that they do not routinely receive JAG School publications, especially *The Army Lawyer*, from their supporting Staff Judge Advocate offices. Staff Judge Advocates are urged to insure that copies of all TJAGSA publications are made available to their local trial defense offices. If distribution is not adequate or if additional copies of any publications are required, requests should be addressed to The Judge Advocate General's School, ATTN: JAGS-DDL, Charlottesville, Virginia 22901.

5. Audiovisual Support for USAR and ARNG

Many USAR and ARNG units request videocassette recordings produced at The Judge Advocate General's School, Army (TJAGSA), for training. As announced in the "Video and Audio Tape Catalog" published yearly by the School, videocassettes cannot be loaned by the School, only dubbed on request. Those requesting dubs must send along the appropriate number of ¾" videocassette blanks.

Some units have reported difficulty getting blank cassettes and playback equipment. Under the provisions of AR 108-2, Army Training and Audiovisual Support, and AR 5-9, Installation Area Coordination, the Training Aids Support Center or audiovisual facility at the U.S. Army installation nearest the unit should support these training needs. If that audiovisual activity cannot provide the needed support, a referral should be made to the nearest installation that can. Videocassette playback units may be borrowed on a hand-receipt basis for these activities. TJAGSA recordings should be described and requested from these activities by letter and accompanied by a DA Form 3903 (Training Audiovisual Work Order) if possible. The servicing audiovisual activity will then send a "dubbing" request to this School along with the necessary blank videocassettes. These are returned by the School to the audiovidual activity which in turn lends them to the unit.

6. Vacancy

Court Reporter. The SJA, MDW, Fort McNair, Washington, D.C., has urgent need for a qualified reporter for GS-8 position. Interested persons are requested to send applications to CW2 Topp, Office of the Staff Judge Advocate, USA MDW, Fort Lesley J. McNair, Washington, D.C. 20319.

7. Note

"Lesson Plan: Law of Armed Conflict: Officer Programs, Initial Training," Enclosure 2 to *Off The Record* (Office of the Judge Advocate, Department of the Navy), Issue No. 8, 9 June 1980.

8. Articles

Erickson, Richard J., Major, *The Requirement for a Home Study and the Adoption of a Foreign Child Abroad*, 9 *The Reporter* 94 (Jun 1980).